# In the Supreme Court of the United States

OCTOBER TERM, 1934

THE UNITED STATES OF AMERICA, PLAINTIFF

*v.*

THE STATE OF OREGON, DEFENDANT

## DEFENDANT'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

# INDEX TO EXCEPTIONS

## A


Page

(1) **Was the Area Involved, i. e. the Land and Overlying Water Within the Meander Line Boundary, Property of the United States upon the Admission of Oregon into the Union February 14, 1859?**

(Report of the Special Master, p. 16) ..... 1

EXCEPTION 1 ..... 1

(2) **Did the Area Involved Constitute Navigable Waters (in fact) on February 14, 1859?**

(Report of the Special Master, p. 17) ..... 2

EXCEPTIONS 2-11 ..... 2-8
In re general findings of non-navigability

EXCEPTIONS 12-13 ..... 9
Classification of other Oregon lakes as non-navigable

EXCEPTION 14 ..... 10

**Trapping and Furbearing Trade.** (Report, p. 20-21)
(a) Oregon's suggested finding ..... 10
(b) Reference to evidence ..... 11

EXCEPTION 15 ..... 11

**Boating and Navigation**
(a) Oregon's suggested finding ..... 12
(b) References to evidence

**Malheur Lake:**
1. Skating ..... 12
2. Rowing for pleasure and recreation ..... 12
3. Rowing in hunting and fishing ..... 13
4. Fur bearing trade ..... 13
5. Commerce ..... 13
6. Sailing ..... 13
7. Using boats with outboard motors ..... 13
8. Using boats with marine engines ..... 14
9. Transportation and patrolling lake ..... 14
10. Economic value of reservation ..... 14

**The Narrows:**
1. Navigating with row boats for pleasure ..... 14
2. Use of row boats for hunting ..... 14
3. Transportation ..... 14
4. Transportation generally ..... 14

**Mud Lake:**
1. Use of row boats for pleasure ..... 15
2. In hunting ..... 15
3. Transportation ..... 15

**Harney Lake:**
1. Use of row boats ..... 15

# INDEX TO EXCEPTIONS
(continued)


Page

EXCEPTION 16, 17 ..... 15, 16
Supplement to Report. (Report, p. xv-xix and p. 21)

EXCEPTION 18 ..... 17
Depths of Lakes and Water Elevations (Report p. 22)
Reference to Evidence:
(a) General appearance and description of lakes 17
(b) Depths ..... 17
(c) Water elevations at various places in and around lakes ..... 18
(d) Water elevations near Saddle Butte..... 19
(e) Water elevations near Town of Lawen..... 19
(f) Water elevations at Windy Point ..... 20
(g) Water elevations ¼ mile westerly of Windy Point ..... 20
(h) Water elevations ½ mile westerly of Windy Point ..... 20
(i) Water elevations ¾ mile westerly of Windy Point ..... 20
(j) Water elevations at bank 1 mile westerly of Windy Point ..... 20
(k) Water elevations on rock in Springer's Sod-house Spring ..... 21
(l) Engineering data on water elevations..... 21
(m) Elevations at Narrows generally..... 21
(n) Elevations at Narrows Bridge ..... 21
(o) Elevations at Narrows road west of bridge.... 21
(p) Elevation at Narrows hotel ..... 22
(q) Elevations at Haines Narrows store..... 22
(r) Elevations at Narrows dance hall ..... 22
(s) Elevations in Malheur Slough..... 22

EXCEPTION 19 ..... 22
Areas of shallower depth not compact (Report, p. 22)

EXCEPTION 20 ..... 23
Transportation of commodities (Report, p. 22)

EXCEPTIONS 21, 22 ..... 23, 24
Rulings and decisions in private litigation (Report, p. 23)

EXCEPTION 23 ..... 25
Army reports and diaries (Report, p. 111)

EXCEPTION 24 ..... 25
Shallowness of water and depths of lakes (Report, p. 117)
References to evidence ..... 26

EXCEPTION 25 ..... 27
Gap or cut in Sand Reef and effect thereof (Report p. 123, Finding XXIV)
1. Oregon's Suggested finding ..... 27

# INDEX TO EXCEPTIONS
(continued)


Page

2. References to evidence:
- a. Appearance of Sand Reef before water cut through with reference to whether it had ever been cut through prior to 1881 ..... 28
- b. Height of Sand Reef in 1881, King, Riddle 28
- c. Height of Sand Reef in 1881, Cecil, Hanley 28
- d. Height of Sand Reef in 1881, Parker ..... 28
- e. Height of Sand Reef in 1895, J. H. Neal..... 28
- f. Height of Sand Reef in ~~1931~~ 1931..... 28
- g. Comparison of height of Sand Reef in years 1881 and 1931, Brenton, Ortego ..... 28
- h. Id., Caldwell, Hibbard, Witzel..... 29
- i. Gap occurred at place in Sand Reef slightly lower than balance of Reef ..... 29
- j. Water elevations of area east of Reef before break ..... 29
- k. Break or cut occurred in spring of 1881..... 29
- l. Eye witnesses to forming of cut, and whether cut occurred naturally or was helped by artificial means ..... 29
- m. Water surface elevations easterly of Sand Reef in 1881 and prior years ..... 29
- n. Description of water surface elevation of Harney Lake westerly of Sand Reef in 1881, and in later years ..... 29
- o. The quantity of water flowing through cut in Sand Reef ..... 30
- p. Artificial attempts later to lower bed of cut through Sand Reef to reduce water elevations in area easterly thereof..... 30
- q. Quicksand in cut ..... 30
- r. Wind conditions at Reef, with reference to whether Reef elevated since 1881..... 30
- s. Channel formed in bed of Sand Reef Division easterly of cut in Reef subsequent to 1881 to elevation of 4083-4 ..... 30

EXCEPTIONS 26, 27, 28, 29, 30 .....30-33
Shallowness of area and depths of water (Report, Finding XXIV, p. 124; Finding XXX, p. 129)

EXCEPTIONS 31, 32, 33 .....34, 35
Commerce, travel and navigation (Report, p. 130)
1. References to effect of irrigation ..... 36

EXCEPTION 34 ..... 36
Game birds (Report, p. 130-131) ..... 36

EXCEPTIONS 35, 36, 37 .....36-38
Trade and Travel (Findings XXXV, XXXVI, Report, p. 131) .....36-38

## INDEX TO EXCEPTIONS
(continued)


Page

### The Mud Lake Division

(Report of the Special Master, pp. 127-128) 39

EXCEPTIONS 38, 39, 40 ..... 39, 40
Oregon's requested Findings; Master's Finding XXVIII (Report, pp. 127-128) ..... 39-40

### The Other Divisions

(Report of the Special Master, p. 128) ..... 41

EXCEPTION 41 ..... 41
Oregon's requested Finding as to Malheur Lake Division, the Narrows Division, the Sand Reef Division, and the Harney Lake Division (Report, p. 128) ..... 41

### (3) Were there Stable Lands Constituting Islands and/or Promontories Within the Area Involved on February 14, 1859?

(Report of the Special Master, p. 25) ..... 41

EXCEPTIONS 42, 43, 44, 45, 46, 47, 48, 49 ..... 41-48
Finding that all lands above 4093 are stable lands and owned by the plaintiff (Report, pp. 66, 133, 25, 119, 22, 21, 118)
References to evidence, in re Exception 42, supra ..... 42
References to evidence, in re Exception 45, supra ..... 44
a. Pelican Island ..... 44
b. Cole Island ..... 45
c. Id. Tules
d. Id. Sugar grass
e. Id. Salt grass
f. Id. Swamp grass
g. Id. Vegetation cut for forage
h. Id. Water grass
i. Id. Wire grass
References to evidence, in re Exception 47, supra ..... 47

### The Narrows Division

EXCEPTIONS 50, 51, 52, 53, 54, 55, 56 ..... 49-51
Finding that the Narrows constitutes a non-navigable stream, and bed to center of stream owned by respective riparian owners (Report, p. 135, 69, 68)

EXCEPTIONS 57, 58, 59 ..... 52, 53
Easements of flowage over the Narrows Division in the United States (Report, p. 69, 137)

## INDEX TO EXCEPTIONS
(continued)


Page

**(4) Was the Meander Line (81.198 miles) Laid Down by J. H. Neal in 1895-1896 and approved in 1897, a Correct Line?**

(Report of the Special Master, p. 25)..... 53

EXCEPTION 60 ..... 53
Plaintiff's challenge herein of correctness of Neal line (Report, p. 27)

1. Oregon's suggested finding..... 54
2. References to evidence:
   a. A correctly established meander line..... 54
   b. Highwater mark of lake as indicated by tules, wire grass and salt grass on shore.... 54
   c. Instructions to Neal, Field Notes and Official Plats ..... 55

**(5) Were there Relicted Lands within the Meander Line Boundary at the Commencement of the Suit?**

(Report of the Special Master, p. 28)..... 55

EXCEPTIONS 61, 62, 63, 64, 65, 66.....55-57
Recession of waters (Report, p. 3, 23, 31)

EXCEPTIONS 67, 68, 111 .....57, 58, 89
Refusal of Special Master to make finding on question of Reliction (Report, p. 128, 31; p. 105)
References to evidence establishing there has been no permanent recession of waters and consequent reliction ..... 58

EXCEPTIONS 69, 70 .....59, 60
Effect of finding of no reliction on rights of third persons not impleaded (Report, p. 31; Finding XXV, p. 125)

**(6) Are the Grants Made by the United States to Lands Bordering Upon the Meander Line Boundary Comparable in Form to Those Involved in Hardin vs. Jordan, 140 U. S. 371?**

(Report of the Special Master, p. 31)

## INDEX TO EXCEPTIONS
(continued)

Page

B

(1) **Is the Common Law in Respect of the Effect of Conveyances of Lands Bordering on a Meandered Lake (i. e. That the Grantee Takes to the Center of a Lake) in Force in Oregon, or Does the Local Law Provide that the Grantee Takes Only to the Water's Edge?**

(Report of the Special Master, p. 33)..... 61

EXCEPTIONS 71, 72, 73, 74, 75, 76, 77 .....61-65
Relating to finding of Special Master that rule of common law giving upland owner title to center of a non-navigable lake applies in Oregon, and legal consequences flowing therefrom (Report, p. 33, 67, 35)

EXCEPTION 78 ..... 66
Is a rule of conveyancing or a rule of property involved? (Report, p. 33)

EXCEPTION 79 ..... 67
Does the rule stated in 63-102 Oregon Code 1930 apply to lakes? (Report, p. 34-35)

EXCEPTION 80 ..... 67
Has Oregon declared rule of local law? Power of this court to do so? (Report, p. 35)

(2) **If the Common Law as Declared in Hardin v. Jordan is in Force in Oregon, is that Rule Applicable to Lakes of the Character and Size of Malheur and Harney Lakes, or Should they be held Exceptions and the Rule Declared Inapplicable Thereto?**

(Report of the Special Master, p. 36)..... 69

EXCEPTIONS 81, 82 ..... 69
Failure of Special Master to pass on this question (Report, p. 36, 37, 67)

(3) **If the Rule in Oregon Limits the Grantee to the Water's Edge does the Title from the Water's Edge to the Center of the Lake Pass to the State of Oregon or Remain in the United States, if and When the Latter Patents or Otherwise Conveys the Upland?**

(Report of the Special Master, p. 37)..... 70

## INDEX TO EXCEPTIONS
(continued)


Page

EXCEPTIONS 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97 ..... 70-78
Ruling of Special Master that title remains in the United States and consequences flowing therefrom (Report, pp. 37, 39, 41, 48, 49, 16, 17, 66, 133, 121, 122, 123, 52, 67)

EXCEPTIONS 98, 99, 100 ..... 79-81
Ruling of Special Master as to ownership of beds of the Narrows and of Mud Lake, whereon the United States is not an upland or riparian owner (Report, p. 133, 136, 137)

EXCEPTIONS 101, 102 ..... 82
Ruling of Special Master as to Ownership of bed of Malheur Lake (Report, p. 67, 137)

EXCEPTION 103 ..... 83
Terms of Decree quieting title in United States (Report, p. 136, par. 14)

EXCEPTION 104 ..... 85
Terms of decree inuring to benefit of private parties (Report, p. 137, subd. 18)

EXCEPTIONS 105, 106, 107, 108, 109, 110 ..... 86-88
Terms of Decree as to Mud Lake (Report, p. 136, sub. 12, 11; p. 70, 68-72); also The Narrows (Report, p 136, 111)

EXCEPTION 111 ..... 88
(See supra under Exceptions 67-68, 111)

EXCEPTION 112 ..... 89
Estoppel (Report, p. 128)


**(4) If the Rule in Oregon be that the Grantee Takes to the Center of the Lake, Does that Rule Apply to a School Section to which Oregon became Entitled under the Act of Admission, Effective, However, Only upon Approved Survey (240 U. S. 210, lines 1-7) if it be Disclosed that the Section Borders Upon a Meander Line; and is the Rule Applicable to School Sections Equally Applicable to Indemnity Lands taken in Lieu of Deficiencies in School Sections?**


(Report of the Special Master, p. 52) ..... 90

## INDEX TO EXCEPTIONS
(continued)


Page

EXCEPTIONS 113, 114, 115, 116, 117 ..... 90-93
Holding of Special Master that rule does not apply to school sections or indemnity lands (Report, p. 52, subd. 4; p. 52, 53, 67, subd. 2)

EXCEPTION 118 ..... 94
Should bed of Mud Lake be apportioned between Oregon and Riparian owners or between Oregon and the United States?

**(5) If Fractional Sections of School Lands Border upon a Meandered Lake and the State Uses the Deficiency within the Meandered Lake as Base for Lieu Lands, is the State also Entitled to the Benefit of the Rule of Hardin v. Jordan?**
(Report of the Special Master, p. 54)..... 95

**Harney Lake Division**
(Report of the Special Master, pp. 71-72).... 95

EXCEPTIONS 119, 120, 121 ..... 95-97
Applicability of rule as to school sections and use of deficiencies in school section as base for lieu lands (Report, p. 71, 55, 72)

**(6) Are the statutes pleaded in Haec Verba in the Amended Answer and Counterclaim (also set out in Supplement, infra, pp. vi to xiv) Effective to give Oregon title to the Lands Within the Meander Line Boundary, or to any thereof?**
(Report of the Special Master, p. 55)..... 98

EXCEPTIONS 122, 123, 124, 125, 126, 127, 128..... 98-103
Validity of Oregon statutes pleaded and power of State to declare waters navigable or public waters (Report, pp. 59-60, 58, 61, 59, 63, 58)

**(7) Was the Executive Order of August 18, 1908, Valid as and from that Date?**
(Report of the Special Master, p. 61)..... 103

EXCEPTIONS 129, 130 ..... 103-104
Was Order ultra vires, invalid and inapplicable to unsurveyed lands on Meander Line Boundary (Report, p. 62, 81)

**The Sand Reef Division**
(Report of the Special Master, p. 61)..... 104

## INDEX TO EXCEPTIONS
(continued)


Page

EXCEPTIONS 131, 132 ..... 104, 105
Same question stated under Exceptions 129, 130, supra (Report, p. 110, Finding XVI; p. 71)

**The Harney Lake Division**
(Report of the Special Master, p. 71, 110).. 106

EXCEPTION 133 ..... 106
Id.

(8) **Did the School Lands (62.76 acres bordering on the Sand Reef Division and 160.87 acres (20.27 acres plus 140.60 acres) on the Harney Lake Division) the Surveys Whereof were Approved Subsequent to the Executive Order, August 18, 1908, Pass to Oregon or are they Still the Property of the United States (United States v. Morrison, supra)?**
(Report of the Special Master, p. 62)
(Covered by Exceptions 131, 132, and 133, supra)

(9) **In View (1) of the Absence from the Case as Parties of (a) the Upland Proprietors and (b) the "settlers" within the Meander Line Boundary, and that (2) Oregon Takes Positions Inconsistent with Claims that they might be Expected to Make, how far Should the Court Proceed in the making of a Decree Without their Presence?**
(Report of the Special Master, p. 63)..... 106

EXCEPTIONS 134, 135, 136, 137, 138 ..... 107-108
In re opinion of Special Master that it would be seemingly inappropriate to bring in riparian owners and settlers; incompleteness of Decree herein without bringing in such parties (Report, p. 63, 137, 135, 65, l. 4-9)

(10) **Is there Anything in the Case Which Requires the Application of the Rule that a Plaintiff in a Suit to Quiet Title must Recover upon the Strength of his Own Title and not upon the Weakness of the Title of the Defendant?**
(Report of the Special Master, p. 64)..... 109

## INDEX TO EXCEPTIONS
(continued)


Page

EXCEPTIONS 139, 140, 141, 142, 143 ..... 109-112
Presenting question whether United States in this case is subject to general rule stated (Report, p. 65, 66)

EXCEPTION 144 ..... 113
Reserving rights of third parties not impleaded (Report, p. 67, subd. 6)

**Conclusions of Law**
(Report of the Special Master, p. 132)..... 113

EXCEPTION 145 ..... 113
To Conclusions of Law of Special Master (Report, p. 132)

**Counterclaim of the State of Oregon**
(Report of the Special Master, p. 137).... .... 114

EXCEPTION 146 ..... 114
Dismissal of Counterclaim except as to matters involved in paragraphs 8 and 11 of proposed Decree (Report, p. 137, subd. 19) ..... 114


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NOTE.

The above Index is arranged under the exact Divisions or Classifications used by the Special Master in his Report.

The abbreviation: "**Abs.**" refers to the printed Joint Abstract of Record filed herein.

The abbreviation: "**p.**" refers to the page of such Abstract of Record.

The abbreviation: "**l.**" refers to the line on the particular page of such Joint Abstract of Record.

The phrase "Defendant's Exception" refers to the particular numbered Exception in the Defendant's Exceptions to the Report of the Special Master filed herein.

The phrase "Report" refers to the "Report of the Special Master" filed herein October 15, 1934.

Following the asterisk (*) is a statement showing the claim of the State of Oregon and what it submits should have been found or recommended by the Special Master in his Report, in lieu of the decision or finding actually made.

Immediately following such suggested ruling and/or finding (in certain instances) is a **list** of the Witnesses and Exhibits with the **page** and **line** of the **Joint Abstract of Record**, and cited in support of the respective Exceptions and the State of Oregon's suggested rulings and findings in lieu of those made by the Special Master.

The list of witnesses are in many instances subdivided under certain letters designated, e.g. **(a)**, **(b)**, etc. (As an illustration see Exception 18, pages 17-22, infra.) Each of such subdivisions is cited to establish certain **fact questions**, the pertinency of which will be argued in the Brief.

# In the Supreme Court of the United States

OCTOBER TERM, 1934

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THE UNITED STATES OF AMERICA, PLAINTIFF

*v.*

THE STATE OF OREGON, DEFENDANT

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## DEFENDANT'S EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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Comes now the State of Oregon and files exceptions to the report of the Special Master, filed herein on October 15, 1934, said exceptions being as follows:

**Was the Area Involved, i.e. the Land and Overlaying Water Within the Meander Line Boundary, Property of the United States Upon the Admission of Oregon into the Union February 14, 1859.**

(Report of Special Master, p. 16)

1

The State of Oregon excepts and objects to the finding of the Special Master that "A vast area of public domain situated in which is now southeastern

Oregon was owned by the United States at and immediately preceding the admission of Oregon into the Union, including the lands here involved."

A formal statement of said finding above excepted to appears in subdivision numbered (1) on page 16 of the Report of the Special Master. It also appears in Finding of Fact numbered V on page 77 of the Report of the Special Master.

The Master should have found and held that prior to the admission of Oregon into the Union the title to the lands involved herein were held in trust for the future state.

**Did the Area Involved Constitute Navigable Waters (in fact) on February 14, 1859.**

(Report of the Special Master, p. 17)

2

The State of Oregon excepts and objects to the finding of the Special Master appearing in subdivision numbered (2) on page 17 of the Report of the Special Master and in Finding No. XXI of the Findings of the Special Master appearing on page 118 of the Report of the Special Master, said finding reading as follows:

"No one of the Divisions lying within the Meander Line Boundary was on February 14, 1859,

and no one of them has since been navigable in fact, and neither trade nor travel did then or at any time since has or could or can move over said Divisions, or any of them, in their natural or ordinary conditions according to the customary modes of trade or travel over water; nor was any of them on February 14, 1859, nor has any of them since been used or susceptible of being used in the natural or ordinary condition of any of them as permanent or other highways or channels for useful or other commerce. The region thereabouts did not nor did any of the Divisions on February 14, 1859, nor has it nor have they since produced commodities which would or could be transported by water, nor has it been nor have they been capable of producing commodities which would or could be transported by water, nor was said region nor any of said Divisions capable of sustaining a population to be served by water transportation."

And the State of Oregon excepts and objects to each and every part of said finding XXI.

A formal statement of said finding appears on page 17 and again on page 118 of the Report of the Special Master.

The Master should have found and held:

The Divisions lying within the Meander Line Boundary and each of them were on February 14th, 1859, and ever since have been navigable in fact, and trade and travel did then and ever since (except in the years 1888, 1889, 1918, 1919, 1930, 1931, 1932, namely periods of abnormally low water) have and could and can move over said Divisions, and each of them, in its natural and ordinary condition according to

the customary modes of trade or travel over water; each of said Divisions was on February 14, 1859 and ever since have been (except in seasons of abnormally low water aforesaid) used and susceptible of being used in its natural and ordinary condition as permanent highways and channels for useful commerce. The region thereabouts and the Divisions did on February 14, 1859 and have since and do still produce commodities which would and could be transported by water, and said region was capable of sustaining a population to be served by water transportation.

(See witnesses under Exceptions 14, 15, 17, 18, 25, infra.)

3

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "No one of the Divisions lying within the Meander Line Boundary was on February 14, 1859, and no one of them has since been navigable in fact, and neither trade nor travel did then or at any time since has or could or can move over said Divisions, or any of them, in their natural or ordinary conditions according to the customary modes of trade or travel over water."

A formal statement of said last quoted finding and conclusion appears in proposed finding XXI submitted to this Court for approval and set forth on page 118 of the Report of the Special Master.

*

The Master should have found and held as suggested in Exception No. 2 supra.

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "Nor was any of them on February 14, 1859, nor has any of them since been used or susceptible of being used in the natural or ordinary condition of any of them as permanent or other highways or channels for useful or other commerce."

A formal statement of said last quoted finding and conclusion appears in proposed finding XXI submitted to this Court for approval and set forth on page 118 of the Report of the Special Master.

*

The Master should have found and held as suggested in Exception No. 2 supra.

5

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "The region thereabouts did not, nor did any of the Divisions on February 14, 1859, nor has it nor have they since produced commodities which would or could be transported by water, nor has it been nor have they been capable of producing commodities which would or could be transported by water, nor was said region nor any of said Divisions capable of sustaining a population to be served by water transportation."

A formal statement of said last quoted finding and conclusion appears in proposed finding XXI submitted by the Special Master to this Court for approval and

set forth on page 118 of the Report of the Special Master.

*

The Master should have found and held as suggested in Exception 2 supra.

6

The State of Oregon excepts to proposed finding XXI submitted by the Special Master to this Court for approval and set forth on page 118 of the Report of the Special Master and to each and every part of said proposed finding.

*

The Master should have found as suggested in paragraph 2 of the Exceptions aforesaid.

7

The State of Oregon excepts and objects to the finding of the Special Master as follows:

> "This finding establishes the case of non-navigability within the decisions of this Court quoted from or cited below."

A formal statement of said last quoted finding and conclusion appears on page 17 of the Report of the Special Master.

*

The Master should have found and held:

> This finding establishes the case of navigability within the decisions of this court quoted from or cited below and other decisions of this court.

7

8

The State of Oregon excepts and objects to the finding of the Special Master as follows:

"The finding above quoted, however, covers and is intended to cover the five Divisions."

A formal statement of said last quoted finding and conclusion appears on page 21 of the Report of the Special Master.

*

The Master should have found and held with reference to each of the five divisions as set forth in Exceptions 11, 15 and 16 supra.

9

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows.

"3. As no part of the area involved constituted navigable waters on that day no part thereof passed from the United States to the State of Oregon upon the admission of the latter into the Union."

A formal statement of said last quoted finding and conclusion appears on page 66, subdivision 3, of the Report of the Special Master.

*

The Master should have held and found that the area involved constituted navigable waters when Oregon was admitted into the Union and passed to the State upon its admission into the Union.

10

The State of Oregon excepts and objects to the recommendation of the Special Master appearing in subdivision numbered 2 on page 133 of the Report of the Special Master, that a decree be entered herein decreeing that:

> "2. No part of said 81,786 acres constituted navigable waters on February 14, 1859, and no part thereof passed from the United States of America to the State of Oregon upon her admission into the Union."

The Special Master should have recommended in place of that portion of the proposed decree numbered 2 on page 133 of his Report, a provision as follows:

> "2. Said 81,786 acres constituted navigable waters on February 14, 1859, and passed from the United States of America to the State of Oregon upon her admission into the Union."

11

The State of Oregon excepts and objects to the report and finding of the Special Master as follows:

> "If Malheur Lake was non-navigable, there is little argument for the navigability of either Mud Lake or Harney Lake, and still less for the Narrows and Sand Reef Divisions."

A formal statement of said last quoted finding and conclusion appears on page 24 of the Report of the Special Master.

The Master should have found and held that Mal-

heur Lake, Mud Lake, The Narrows, Harney Lake and the waters designated by him as The Sand Reef Division were navigable in fact.

42

The State of Oregon excepts and objects to the report of the Special Master as follows:

> "(A list of meandered lakes in Oregon described as navigable and non-navigable will be found in Joint Abstract of Record, Volume II, pp. 875-878, coupled with Ganong's conformatory table (pp. 878-882), and Jewett's general description of the lakes (pp. 882-889).)"

A formal statement of said last quoted finding and conclusion appears on page 24 of the Report of the Special Master.

*

The Master should have found and held that said lakes were navigable in fact.

13

The State of Oregon excepts and objects to the words "described as navigable and non-navigable" in that portion of proposed finding XXVII submitted to this Court for approval by the Special Master and set forth on page 126 and 127 of the Report of the Special Master as follows:

> "A list of meandered lakes in Oregon described as navigable and non-navigable will be found in Joint Abstract of Record, Volume II, pp. 875-878, coupled with Ganong's conformatory table (pp. 878-882), and Jewett's general description of the lakes (pp. 882-889)."

The Master should have eliminated from his finding the words "described as navigable and non-navigable," for the reason that whether they are navigable or non-navigable depends upon the final decision in this case.

**Trapping.**

(Report of the Special Master, p. 20).

14

The State of Oregon excepts and objects to the summarization of the evidence upon "(a) trapping operations," set forth in the Report of the Special Master on pages 20 and 21 thereof, and the Master's acceptance of John Jardner's testimony that "the industry did not become important." This exception is based upon the ground that the evidence quoted by the Special Master on pages 20 and 21 of the Report of the Special Master is incomplete.

The Master should have found that the evidence with reference to trapping of fur-bearing animals shows that the industry did become important and a large and valuable fur bearing trade was carried on over the waters of Malheur Lake, Mud Lake and The Narrows, and the waters of said lakes were used in their natural and ordinary condition, according to the customary modes of trade and travel over water in such fur-bearing trade.

Baker, Abs. p. 715, line 34. Bendire, Abs. p. 750-754. Benson, Abs. p. 720, line 30-45; p. 723, line 45-48; p. 724, line 1-5. Bunyard, Abs. p.

716, line 43; p. 717, line 1-13, 15-17, 20-35. Caldwell, Abs. p. 714, line 21, 23. Comegys, Abs. p. 982, line 15-20; 719, line 25-27. Dunn, Abs. p. 720, line 14-17. Farrier, Abs. p. 720, line 20. Finley, Abs. pp. 960-963. Gardner, Abs. p. 715, line 5-25; p. 965, line 39; p. 353, line 18-21. Hamilton, Abs. p. 716, line 13. Hanley, Abs. p. 719, line 3-8; p. 718, line 40. Heinz, Abs. p. 330, line 10-20; p. 957; p. 997-998. Hibbard, Naturalist, Abs. pp. 952-957; p. 719, line 38-45; p. 720, line 3-11. Howser, Abs. p. 714, line 40. Jewett, Abs. pp. 957-960. Marshall, Abs. p. 720, line 24-27. Sizemore, Abs. p. 970, line 17-23. Whiting, Abs. p. 714, line 21. Benson, Abs. p. 721, 722. Hanley, Abs. p. 1004 l. 25-30.

(Report of the Special Master, p. 27).

**Boating.**

15

The State of Oregon excepts and objects to the finding of the Special Master with reference to boating, which finding was as follows:

> "The boating which took place in the area involved to which much importance is attached by counsel for Oregon, had no commercial aspects and is no indication of navigability; it was such as might reasonably be expected to occur in a swampy area of the character and magnitude of that here involved. The boating was quite as consistent with the want of navigability as with navigability in fact."

A formal statement of said last quoted finding and conclusion appears on page 21 of the Report of the Special Master.

The Special Master should have found as follows:

Malheur Lake has been used for the purpose of commerce and navigation from the earliest date the white man settled in Harney Valley. Such use consisted in skating on the ice in winter (1), and in rowing over the waters of the lake in row boats and skiffs for pleasure and recreation (2), in hunting for wild water-fowl (3) and in trapping for fur bearing animals (4); in a few instances produce other than water-fowl and fur bearing animals were transported across its waters (5); a number of persons caused their boats to be propelled by sails (6); others used outboard motors in their boats (7), and others marine engines (8); some used the boats for purposes of transportation (9), and the lake had great economic value (10).

(1) Skating: John Emery Graves, Abs. p. 712, l. 25. Lester Marion Hamilton, Abs. p. 380, l. 15-17; p. 762, l. 19-25; p. 770, l. 44.

(2) Rowing for pleasure and recreation: John W. Heinz, Abs. p. 330, l. 14. Joe Ausmus, Abs. p. 331, l. 41. Geo. E. Whiting, Abs. p. 334, l. 10, 13. Abs. p. 371, l. 34-44. Archie McGowan, Abs. p. 344, l. 1-4. Lester Marion Hamilton, Abs. p. 380, l. 1. Abs. p. 665, l. 16. Joseph William Clark, Abs. p. 502, l. 26; 505, l. 8. Frank Catterson, Abs. p. 512, l. 5. Dr. L. E. Hibbard, Abs. p. 956, l. 5, l. 25. Clarence Thos. Carey, Abs. p. 972, l. 25. Edmund J. Martin, Abs, p. 974, l. 12. A. E. Brown, Abs. p. 975, l. 20. Cortis E. Elliott, Abs, p. 977, l. 1, 6, 14, 25, 30-39, 41. Paul Ware, Abs. p. 980, l. 35. Guy L. Hembree, Abs. p. 981, l. 8. Thos. T. Dunn, Abs. p. 983, l. 8. Hayden Elliott,

Abs. p. 993, l. 25-44. Stanley Jewett, Abs. p. 1006, l. 26-33.

(3) Rowing in hunting, fishing: John G. Darsey, Abs. p. 345, l. 17; p. 537, l. 38; Abs. 992, l. 26. Martin Anderson Lucas, Abs. p. 359, l. 24; Abs. p. 971, l. 23. Joseph William Clark, Abs. p. 976, l. 42. LeRoy Bunyard, Abs. p. 978, l. 20, 27, 45. Charles Sumner Johnson, Abs. p. 979, l. 42. John Edward Loggan, Abs. p. 972, l. 44; Abs. p. 973, l. 1-5. Jesse O. Alberson, Abs. p. 980, l. 5. Paul Ware, Abs. p. 980, l. 45; Abs. p. 981, l. 3. Lloyd D. Culp, Abs. p. 984, l. 1. Mrs. Ollie Darsey, Abs. p. 985, l. 20; p. 986, l. 8. John L. Hembree, Abs. p. 986, l. 13-24, 34; Abs. p. 987, l. 14; 985, 988. William David Huffman, Abs. p. 990, l. 23. George M. Benson, Abs. p. 995, l. 13. Captain Charles Bendire, Abs. p. 751, l. 10.

(See witnesses under Exception 14, supra).

(4) Fur bearing animals: John Gardner, Abs. p. 353, l. 3. Geo. M. Benson, Abs. p. 722, l. 42; Abs. p. 995, l. 13, 16, 19, 31. John W. Heinz, Abs. p. 997, l. 3, 10, 37; Abs. p. 998, l. 12. George S. Sizemore, Abs. p. 970, l. 18.

(See witnesses under Exception 14, supra).

(5) Commerce: Thos. T. Dunn, Abs. p. 983, l. 8. Charles Sumner Johnson, Abs. 979, l. 42. Will Y. King, Abs. p. 966, l. 21. Wm. Hanley, Abs. p. 1004, l. 29.

(6) Sailing: Edmund J. Martin, Abs. p. 340, l. 40; p. 341, l. 1; p. 628, l. 36. Captain Charles Bendire, Abs. p. 751, l. 1, l. 37. George S. Sizemore, Abs. p. 970, l. 24.

(7) Outboard Motor: Dr. L. E. Hibbard, Abs. p. 667, l. 34. Geo. M. Benson, Abs. p. 999, l. 34; p. 1000, l. 1-14. James Henry Gibson, Abs.

p. 1002, l. 22. F. W. Triska, Abs. p. 1005, l. 7-11; p. 1006, l. 3-4.

(8) Marine Engine: John W. Heinz, Abs. p. 997, l. 3, 10, 37; Abs. p. 998, l. 12, 14, 34, 41, 45.

(9) Transportation and patrolling lake: Effie L. Dunn, Abs. p. 975, l. 36. Mrs. Fay Comegys, Abs. p. 981, l. 30, 41. Dr. L. E. Hibbard, Abs. p. 990, l. 27-32; p. 999, l. 31-35. Geo. Benson, Abs. p. 1000, l. 12; Abs. p. 241, l. 27, 33; Abs. p. 1001, l. 1.

(10) Economic value of Reservation: See Bendire, supra, under Exception 14. William Hanley, Abs. p. 717, l. 38-50. George M. Benson, Abs. p. 723, l. 45. Thomas G. Howser, Abs. p. 714, l. 40.

*

The Master should have found that the waters of the Narrows have been used for navigating the same with row boats for pleasure (1), in hunting (2), for transporting persons across its waters (3), and for transportation (4).

(1) Geo. H. Bollenbaugh, Abs. p. 1013, l. 31. Mrs. Fay Comegys, Abs. p. 1014, l. 8, 12. Hadden Elliott, Abs. p. 1014, l. 26, 29. Alphena Venator, Abs. p. 1014, l. 35. Richard A. Smith, Abs. p. 1009, l. 17.

(2) Hunting: LeRoy Bunyard, Abs. p. 1012, l. 37. Guy L. Hembree, Abs. p. 1013, l. 25.

(3) Cortis E. Elliott, Abs. p. 1012, l. 38.

(4) Transportation: Paul Ware, Abs. p. 1014, l. 16. Stanley G. Jewett, Abs. p. 1013, l. 19.

*

The Master should have found that at various times persons used Mud Lake for the purpose of navigating

the same with row boats for pleasure (1), and for hunting (2) and for transportation.

(1) Cortis E. Elliott, Abs. p. 1007, l. 18, 23, 34; Abs. p. 1008, l. 1, 15, 45. Dr. L. E. Hibbard, Abs. p. 1010, l. 35, 37; Abs. p. 1011, l. 5. Richard A. Smith, Abs. p. 1008, l. 45. Hadden Elliott, Abs. p. 1012, l. 12, 18.

(2) Hunting and gathering duck eggs: Wm. J. Dunn, Abs. p. 1007, l. 3, 6, 10. Richard A. Smith, Abs. p. 1008, l. 45; Abs. p. 1009, l. 4. Paul Ware, Abs. p. 1009, l. 31, 45.

(3) Transportation: Paul Ware, Abs. p. 1010, l. 3. Lester Marion Hamilton, Abs. p. 1011, l. 20, 25, 33.

*

The Master should have found that at various times persons went out on Harney Lake in row boats (1).

(1) George H. Bollenbaugh, Abs. p. 1002, l. 35; Abs. p. 1003, l. 1. Dr. L. E. Hibbard, Abs. p. 1003, l. 9. Willis George Bardwell, Abs. p. 1003, l. 13. John H. Witzel, Abs. p. 821-822. Francis W. Triska, Abs. p. 1006, l. 5.

16

The State of Oregon excepts and objects to the finding of the Special Master as follows:

"In order not to unduly prolong the report, a condensed statement of the testimony on boating will be found in the Supplement to this report, infra, pp. XV-XIX."

A formal statement of said last quoted finding and conclusion appears on page 21 of the Report of the Special Master.

16

*

The Master should have found and held that the testimony referred to in the Supplement to his Report, pp. XV-XIX establishes navigability in fact.

17

The State of Oregon excepts and objects to the summarization of the evidence relating to boats and boating and presented upon the issue of navigability as set forth in the Supplement to the Report of the Special Master, pp. XV-XIX.

This exception is based upon the ground that the evidence set forth in said summarization on said pages XV-XIX in the Supplement to the Report of the Special Master is incomplete, defective and fails to include a great portion of the evidence relating to the use of boats and boating in trade and travel upon said water, all as appears in the Joint Abstract of Record.

*

The Master should have found and held that the evidence on pages XV-XIX in the Supplement to the Report establishes navigability in fact; and such navigability in fact is supported by the testimony of Mott V. Dodge, R. D. Cooper, C. B. McConnell, and Harry Z. Smith, Defendant's Exhibit X-6, Plaintiff's Exhibits 3 and 3A, 4 and 4A and the depths when water is at elevation 4093 feet above sea level shown on pages 119, 120 and 121 of the Master's Report.

Cooper, Abs. p. 901, l. 38-45; p. 902, l. 21-26, 27-28. Dodge, Abs. p. 895, l. 39-40; p. 893, l. 38-46; p. 899, l. 1-47; p. 900, l. 1-4; 9-19;

23-28. Defendant's Exhibit X-1, Abs. p. 852-870. McConnell, Abs. p. 903, l. 7-26. Pecore Abs. p. 897, l. 32. Smith, Abs. p. 901, l. 6-10.

18

The State of Oregon excepts and objects to the finding of the Special Master as follows:

"It is difficult to entertain the idea that a lake made up of 47,670.4 acres is navigable, with water throughout the lake at a mean elevation of 4093 and with depths shown in finding XXII."

A formal statement of said above quoted finding and conclusion appears on page 22 of the Report of the Special Master.

The depths shown in finding XXII appear on pages 22 and 119 of the Report of the Special Master.

(a)

Dalton, Abs. p. 561, l. 8-22. Dalton, Abs. p. 561, l. 8-19. Dunn, Abs. p. 632, l. 10. Elliott, Abs. p. 793, l. 26-30. Fitzgerald, Abs. p. 393, l. 36-39; p. 394, l. 21-29; p. 464, l. 40-45. Hanley, Abs. p. 839, l. 41; p. 840, l. 1-2; p. 832, l. 10-11. Irving, Abs. p. 362, l. 8-16. Kilburn, Abs. p. 412, l. 31-37. Lucas, Abs. p. 360, l. 5-9. Marshall, Abs. p. 559, l. 18-21. Ortego, Abs. p. 370, l. 5-7; p. 368, l. 35-38. Sizemore, Abs. p. 459, l. 27-40. Smyth, Abs. p. 364, l. 37-40. Stafford, Abs. p. 386, l. 39-44. Whiting, Abs. p. 348, l. 41.

(b)

Ausmus, Abs. p. 630, l. 15. Benson, Abs. p. 1000, l. 10; p. 620, l. 40. Brandon, Abs. p. 759, l. 10-14. Bunyard, Abs. p. 509, l. 43-47; p. 510, l. 1-2; p. 626, l. 40. Caldwell, Abs. p. 622, l. 4-10; Campbell, Abs. p. 629 l. 9. Cooper & Dodge, Abs. p. 1087, l. 34-36. Cooper, Abs. p.

872. Darsey, Abs. p. 689, l. 12-14. Defendants Exhibit X-1 and graph attached thereto, Abs. p. 266-269, 862-871. Defendants Exhibit X-2, Abs. p. 873-5. Defendants Exhibit X-6. Defendants Exhibit X-7, Abs. p. 914-917. Dodge, Abs. p. 634-634; p. 872; p. 873; p. 898, 904, 912. Finley, Abs. p. 630, l. 25-35. Gibson, Abs. p. 627, l. 3. Graves, Abs. p. 592, l. 41-46; p. 619, l. 10-12, 23-25; p. 629, l. 31-39. Hembree, Abs. p. 625, l. 35; p. 626, l. 1. Hibbard, Abs. p. 580, l. 1-13; p. 627, l. 7-15; p. 996, l. 35-45. Huffman, Abs. p. 577, l. 18. Jessup, Abs. p. 963, l. 22-25; p. 1079, l. 18; p. 1071, l. 38-40. Kilburn, Abs. p. 625, l. 20. Lucas, Abs. p. 359, l. 40-44. Martin, Abs. p. 628, l. 10. Ortego, Abs. p. 369, l. 34-37; p. 367, l. 40-47. Pecore, Abs. p. 595, l. 45. Peterson, Abs. p. 381, l. 6-7. Reinemann, Abs. p. 531, l. 15; p. 627, l. 19. Sizemore, Abs. p. 459, l. 47; p. 460, l. 1-2. Smith, Abs. p. 788; p. 789, l. 34-36. Smyth, Abs. p. 631, l. 23-39. Thompson, Abs. p. 606, l. 14; p. 625, l. 10. Turner, Abs. p. 535, l. 11-15. Vickers, Abs. p. 622, l. 24. Whiting, Abs. p. 349, l. 43-45; p. 714, l. 28-34. Witzel, Abs. p. 626, l. 22.

(c)

Ausmus, Abs. p. 630, l. 15. Biggs, Abs. p. 606, l. 31, 38; p. 607, l. 1-4. Brown, Abs. p. 436, l. 26; p. 488, l. 46. Bunyard, Abs. p. 598, l. 35-44; p. 670, l. 7. Campbell, Abs. p. 553, l. 42; p. 554, l. 23-28; p. 555, l. 14-17; p. 629, l. 11. Carey, Abs. p. 562, l. 4, 20; p. 563, l. 5, 42; p. 481, l. 19; p. 488, l. 1; p. 562, l. 5. Catterson, Frank, Abs. p. 285, l. 25; p. 286, l. 10-22; p. 512, l. 5-9. Catterson, Ralph, Abs. p. 582, l. 39; p. 581, l. 10-14; p. 582 l. 25-27. Cawlfield, Abs. p. 547, l. 1-3, l. 29-32, l. 40-45, l. 47; p. 544, l. 46; p. 545, l. 1-8, 10-15, l. 20; p. 546, l. 1-4, 14-17. Clark, Abs. p. 503, l. 25-48. Comegys, Abs. p.

777, l. 35; p. 778, l. 1-3, 29. Comegys, Abs. p. 526, l. 30. Dillman, Abs. p. 585, l. 11-14, 17-22; 33-34; 10-20. Dunn, Abs. p. 142, l. 3. Gibson, Abs. p. 564, l. 40; p. 565, l. 10-15, 39-43. Graves, Abs. p. 592, l. 22, 41-43; p. 594, l. 4-6, 10; p. 629, l. 31. Griffin, Abs. p. 610, l. 17; p. 551, l. 17; p. 223, l. 20-33. Haley, Abs. p. 555, l. 27-29. Hanley, Abs. p. 518, l. 29-32. Heinz, Abs. p. 532, l. 48-49. Hill, Lyle B., Abs. p. 611, l. 41. Hill, Ora Winfield, Abs. p. 325, l. 34. Huffman, Abs. p. 576, l. 10. Kado, Abs. p. 611, l. 38. Loggan, Abs. p. 654, l. 40. Marshall, Abs. p. 478, l. 27. Ortego, Abs. p. 370, l. 20-27. Peterson, Abs. p. 604, l. 4, 25, 33. Smith, Abs. p. 788, l. 1-27; p. 789, l. 34-35. Spurlock, Alvin C., Abs. p. 535, l. 44; p. 216, l. 27-34. Spurlock, Chas. A., Abs. p. 537, l. 46; p. 538, l. 14-22. Thompson, Abs. p. 405, l. 43; p. 406, l. 5-10. Ware, Abs. p. 790, l. 30, 34-36; p. 791, l. 1-7. Whiting, Abs. p. 349, l. 11-16. Witzel, Abs. p. 507, l. 29; p. 385, l. 10; p. 384, l. 32-34; p. 385, l. 11; p. 192, l. 39. Woldenburg, Abs. p. 480, l. 17-30; McKenzie, Abs. p. 769 l. 9-11.

(d)

Caldwell, Abs. p. 397, l. 15-20. Gardner, Abs. p. 353, l. 26, 40-44; p. 383, l. 1-8. Hamilton, Abs. p. 560, l. 5. Kilburn, Abs. p. 412, l. 4-12. Lucas, Abs. p. 359, l. 44; p. 360, l. 21, 35. Vickers, Abs. p. 352, l. 23-25. Whiting, Abs. p. 349, l. 1-7.

(e)

Hayes, Abs. p. 945, l. 9-15. Howser, Abs. p. 351, l. 10-11. McKinnon, Abs. p. 416, l. 15. Vickers, Abs. p. 352, l. 18-22. Whiting, Frank, Abs. p. 349, l. 26-28. Whiting, Schuyler, Abs. p. 479, l. 9-13; p. 382, l. 36-40.

Defendant's Exhibit X-7, Abs. p. 917, l. 1-6; Plaintiff's Exhibit 3 contour lines at Windy Point.

(f)

Caldwell, Abs. p. 396, l. 31-37; p. 397, l. 1-6, 10-15. Fitzgerald, Abs. p. 395, l. 8-10; p. 392, l. 44-47; p. 464, l. 40-45; p. 393, l. 1; p. 394, l. 33. Gardner, Abs. p. 354, l. 6-7. Howser, Abs. p. 350, l. 26; p. 351, l. 1-8. Kilburn, Abs. p. 412, l. 10-13. McKinnon, Abs. p. 415, l. 37-42. Ortego, Abs. p. 368, l. 5-12, 19-22, 42, 45. Peterson, Abs. p. 403, l. 20. Woldenburg, Abs. p. 413, l. 10-14.

(g)

Baker, Abs. p. 506, l. 11-17, 40; p. 507, l. 13-15. Gardner, Abs. p. 353, l. 29-33. McKinnon, Abs. p. 415, l. 40. Riddle, Abs. p. 383, l. 14-16.

(h)

Baker, Abs. p. 400, l. 39-42. Billingsley, Abs. p. 357, l. 36-40; p. 399, l. 26-33. Brandon, Abs. p. 433, l. 11-17. Cummings, Abs. p. 367, l. 9. Hanley, Abs. p. 389, l. 34-36. Hayes, Abs. p. 447, l. 20-24. Horton, Abs. p. 381, l. 32-35. Irving, Abs. p. 361, l. 25. King, Abs. p. 355, l. 39-41. Lucas, Abs. p. 360, l. 30. Peterson, Abs. p. 403, l. 32-34, 43-45; p. 405, l. 18. Whiting, Abs. p. 398, l. 38-39.

(i)

Baker, Abs. p. 376, l. 4-9; p. 400, l. 40-45. Irving, Abs. p. 361, l. 25-34. Shepherd, Abs. p. 518, l. 1-5.

(j)

Alberson, Abs. p. 452, l. 34; p. 453, l. 15-20. Brandon, Abs. p. 435, l. 1. Catterson, Abs. p. 582, l. 16-22; p. 582, l. 27-36. Clark, p. 463, l. 27. Fitzgerald, Abs. p. 392, l. 44-47; p. 394, l. 2-4, 30-35. Gardner, Abs. p. 354, l. 1-3. Howser, Abs. p. 479, l. 37-42. Huffman, Abs. p. 577, l. 23-29. Marshall, Abs. p. 473, l. 34-38. Jenkins, Abs. p. 382, l. 26-31. Peterson, Abs. p. 404, l. 27; p. 403, l. 35. Sizemore, Abs. p. 459, l. 2. Smyth, Abs. p. 402, l. 3-8, 28. Ven-

eator, Abs. p. 396, l. 3-6. Whiting, Frank, Abs. p. 348, l. 19-38; Whiting, Schuyler, Abs. p. 479, l. 14-22.

(k)

Benson, Abs. p. 732, l. 7-8, 19-22. Catterson, Abs. p. 729, l. 38-45. Fry, Abs. p. 726-728. Gardner, Abs. p. 354, l. 19-23. Hanley, Abs. p. 728, l. 41; p. 729, l. 1-3. Marshall, Geo., Abs. p. 729, l. 9-16, 34. Marshall, John, Abs., p. 731, l. 32-39. Ortego, Abs. p. 369, l. 19-23; p. 725, l. 4. Pecore, Abs. p. 732, l. 28-34. Springer, Abs. p. 730, l. 16, 25-26, 27-30; p. 469, l. 35-37, 40-44. Smyth, Abs. p. 402, l. 44-46.

(l)

Dodge, Abs. p. 900, l. 11; p. 865, l. 8. Pecore, Abs. p. 755, l. 7-8; p. 860, l. 33-40; Defendant's Exhibit X-7, Abs. p. 914. Defendant's Exhibit X-2, Abs. p. 874. Plaintiff's Exhibit 3 and 3A.

(m)

Brandon, Abs. p. 759, l. 10-14. Elliott, Abs. p. 774, l. 16, 20-29. Graves, Abs. p. 782, l. 25-27. Haines, Abs. 779, l. 38-40. King, Abs. p. 756, l. 27-28. Ortego, Abs. p. 757, l. 44. Sizemore, Abs. p. 459 l. 19-46; p. 460 l. 1-2. Witzel, Abs. p. 761, l. 1-3.

(n)

Elliott, Abs. p. 774, l. 31-34. Gardner, Abs. p. 756, l. 14. Hamilton, Abs. p. 770, l. 35-37. Hembree, Abs. p. 766, l. 34-45; p. 776, l. 34-37. Lewis, Abs. p. 771, l. 16. Loggan, Abs. p. 781, l. 18-20. McKenzie, Abs. p. 768, l. 37-42. McKinnon, Abs. p. 763, l. 1-5. Ortego, Abs. p. 757, l. 41. Shepherd, Abs. p. 775, l. 21-24. Simmons, Abs. p. 768, l. 10-11; p. 780, l. 4-15.

(o)

Gardner, Abs. p. 355, l. 11-13, 14-15. Hamilton, Abs. p. 770, l. 30-32. Jenkins, Abs. p. 780, l.

40-42. McGee, Abs. p. 782, l. 6-7. Simmons, Abs. p. 780, l. 10-15.

(p)

Gardner, Abs. p. 756, l. 8-11. Hamilton, Abs. p. 770, l. 24-25, 29-32.

(q)

Gardner, Abs. p. 756, l. 11. Ortego, Abs. p. 367, l. 18-20.

(r)

Elliott, Abs. p. 774, l. 45-47. Hamilton, Abs. p. 770, l. 15-16, 20, 26-30.

(s)

Baker, Abs. p. 506, l. 29. Bardwell, Abs. p. 435, l. 4. Darsey, Abs. p. 345, l. 18. Gardner, Abs. p. 890, l. 11. Hanley, Abs. p. 890, l. 27-29; p. 891, l. 7, 20, 25, 33, p. 892, l. 5. Horton, Abs. p. 892, l. 17, 27. McKinnon, Abs. p. 416, l. 5. Thompson, Abs. p. 893, l. 11, 17, 33.

19

The State of Oregon excepts and objects to the finding of the Special Master as follows:

> "The lands classified according to depths are not in compact bodies (Plaintiff's Contour Map 3A and 4A) which strengthens the conclusion that the waters were not navigable in any practical sense."

A formal statement of said last quoted finding and conclusion appears on page 22 of the Report of the Special Master.

The Master should have found and held that the fact that some portions of the bed were higher than other portions and deeper portions of the lake separated from other deeper portions by shallower por-

tions does not affect the question of the navigability of the lakes.

20

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "There is not a single item of evidence that any commodities were ever transported over the waters of Malheur Lake except a small quantity of hay in a single instance (Johnson, Joint Abstract, Vol. II, p. 979), and fur-bearing animals."

A formal statement of said last quoted finding and conclusion appears on page 22 of the Report of the Special Master.

*

The Master should have found and held that in addition to the transportation of hay and fur bearing animals upon and over the waters of the lakes, that large quantities of eggs, ducks, geese and other wild water fowl were transported on and over such waters.

(See witnesses referred to in Exceptions 14 and 15, supra.)

21

The State of Oregon excepts and objects to the finding of the Special Master as follows:

> "The fact that the area involved is non-navigable seems to have been taken for granted from very earliest days until the enactment of the Oregon legislation of 1921."

A formal statement of said last quoted finding and

conclusion appears on page 23 of the Report of the Special Master.

*

The Master should have found that the taking for granted that the area involved was non-navigable was made by private parties in pleadings and briefs, and that the State of Oregon was not a party thereto and is not bound thereby, and the same has no evidentiary value herein.

(Dfts. Exh. X-4, Abs. p. 246, l. 27-28. Plff's. Exh. 59, Abs. p. 261, l. 17-18. Plff's Exh. 61, Abs. p. 157, l. 14; p. 165, l. 17-18; p. 169, l. 20-22.)

22

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "It will be seen that Malheur Lake is the one most frequently mentioned. The proofs show beyond doubt that Malheur Lake was not navigable and its non-navigability was taken as a matter of course by all who had occasion to deal therewith until Oregon passed Chapter 282, Sec. 1, subs. (c), General Laws of Oregon, 1923, (Amended Answer and Counterclaim, p. 38. Supplement to this Report, infra, p. XI)."

A formal statement of said last quoted finding and conclusion appears on page 24 of the Report of the Special Master.

*

The Master should have found and held that Malheur Lake was navigable in fact, and that the State

of Oregon is not bound by concessions of private parties in litigation in which Oregon was not a party.

(See witnesses under Exception 21, supra.)

23

The State of Oregon excepts to the purported accuracy of the history of the Malheur Lake region from 1825 to 1872, given in the report and testimony of Dr. R. C. Clark of the University of Oregon, found in Joint Abstract of Record, page 1014, and following.

A formal statement of said last quoted finding and conclusion of the Special Master appears in proposed finding XVIII submitted to this Court for approval and set forth on page 111 of the Report of the Special Master.

*

The Master should have held and found that the Sand Reef was not cut through until the year 1881, and that any flowing of water from Malheur Lake, Mud Lake, and the Sand Reef Divisions and The Narrows into said Harney Lake was merely a union of the upper waters in Harney Lake and east of the Sand Reef and of waters standing at an elevation of approximately 4105 feet above sea level.

(See witnesses under Exception 25, infra.)

24

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that Harney and Malheur Lakes always have been shallow lakes, the waters thereof being variable in area and depth and that during most of each year from 1918

to 1931, except the years, 1921, 1922 and 1928 the recession of the waters of Malheur Lake was practically complete.

A formal statement of said last quoted finding and conclusion appears in proposed finding XX submitted to this Court for approval and set forth on page 117 of the Report of the Special Master.

*

The Master should have found and held that Harney and Malheur lakes, until the breaking of the Sand Reef in 1881, had an elevation of not less than 4105 feet above sea level, and that since the breaking of the Sand Reef, except in the dry years of 1888, 1889, 1918, 1919, 1930, 1931 and 1932, the waters of the lakes were sufficient in depth to stand and cover the entire bed of Malheur Lake, except a comparatively small portion of Pelican Island and Graves Ridge or Island; that the conditions in the years referred to were due to lack of precipitation, the flowage of waters into the sump of Harney Lake, and the use of waters for irrigation, and there has been no recession of the waters of said lakes, though the bed of Harney Lake for a number of years last past has been substantially dry. That the water was usually a great deal higher than in recent years.

Biggs, Abs. p. 927, l. 9-10; 607, l. 24. Brown, Abs. p. 931, l. 10-11. Caldwell Abs. p. 919, l. 31-35. Catterson, Abs. p. 931, l. 22-23. Cawlfield, Abs. p. 633, l. 35-36. Cecil, Abs. p. 920, l. 5-6. Darsey, Abs. p. 560, l. 43-46. Dunn, Abs. p. 632, l. 10-11. Fry, Abs. p. 439, l. 11. Haley, Abs. p. 633, l. 41-42. Irving, Abs. p. 921, l. 27. King, Abs. p. 631, l. 7. Mc-

Kenzie, Abs. p. 634, l. 8-10. Ortego, Abs. p. 369, l. 38-48, 34-38. Peterson, Abs. p. 381, l. 6-7. Report of the Special Master, Vol. 2, Appendix 17, pp. 89-94. Riddle, Abs. p. 922, l. 26-28. Sizemore, Abs. p. 633, l. 12. Spurlock, Abs. p. 633, l. 24-27. Thompson, Abs. p. 408, l. 38-41. Comegys, Abs. p. 779, l. 6. Vickers, Abs. p. 634, l. 19-20. Veneator, Abs. p. 634, l. 22. Whiting, Abs. p. 374, l. 32-34, 34-42.

(See witnesses under Exception 17, supra, and 25, infra.)

25

The State of Oregon excepts and objects to that part of proposed finding XXIV submitted to this Court for approval by the Special Master and set forth on page 123 of the Report of the Special Master, which proposed finding and conclusion is as follows:

"But it is not true that by reason of the break in the Sand Reef the waters of Malheur Lake became united with the lower water surface of Harney Lake by a strait described in the Bill of Complaint as Mud Lake and the Narrows, and it is not true that unknown persons caused a cut or rift to be cut or broken in the top of the Sand Reef during high waters in Malheur and Mud Lakes, or that by reason thereof a current of great capacity was formed and vast quantities of water flowed through Malheur and Mud Lakes into Harney Lake."

*

The Master should have found and held and submitted a finding instead of the proposed Finding XXIV contained on page 123 of the Master's Report, as follows:

"By reason of the break in the Sand Reef the waters of Malheur Lake became united with the lower water surface of Harney Lake by a strait described in the Bill of Complaint as Mud Lake and The Narrows, and Mark Brenton or other unknown persons, caused a cut or rift to be cut or broken in the top of the Sand Reef during high waters in Malheur and Mud Lakes, and that by reason of such cut and rift in said Sand Reef a current of great capacity was formed and vast quantities of water flowed through Malheur and Mud Lakes into Harney Lake."

(a)

Bardwell, Abs. p. 856, l. 32-33. Caldwell, Abs. p. 856, l. 3, 4-7; p. 834, l. 24-26. Fitzgerald, Abs. p. 855, l. 23, 30-31. Hamilton, Abs. p. 857, l. 7. Hanley, Abs. p. 832, l. 30-32; p. 855, l. 15-17. Hibbard, Abs. p. 856, l. 39-40; p. 857, l. 1-3. Ortego, Abs. p. 854, l. 17. Parker, Abs. p. 856, l. 15-16. Riddle, Abs. p. 854, l. 39-40. Smyth, Abs. p. 854, l. 3; p. 828, l. 23-40; p. 827, l. 6. Witzel, Abs. p. 832, l. 1-4; p. 855, l. 3.

(b)

King, Abs. p. 835, l. 42-44; p. 836, l. 10-17. Riddle, Abs. p. 830, l. 28-33.

(c)

Cecil, Abs. p. 835, l. 12-13. Hanley, Abs. p. 832, l. 26-27; p. 853, l. 3, 6-10.

(d)

Parker, Abs. p. 839, l. 11-12.

(e)

Plaintiff's Exh. 39-K, Abs. p. 9.

(f)

Plaintiff's Exh. 4 and 4-A.

(g)

Brenton, Abs. p. 853, l. 33-35. Ortego, Abs. p. 852, l. 32-34.

(h)

Caldwell, Abs. p. 851, l. 40; p. 852, l. 2. Hibbard, Abs. p. 853, l. 13-19. Witzel, Abs., p. 852, l. 39-40; l. 43-45.

(i)

Cecil, Abs. p. 835, l. 18-21. Fitzgerald, Abs. p. 833, l. 11-17, 23. Parker, Abs. p. 838, l. 20-24; p. 839, l. 7-12. Witzel, Abs. p. 831, l. 12-19.

(j)

Hanley, Abs. p. 832, l. 28-29. Ortego, Abs. p. 368, l. 36-38; p. 757, l. 29-33; p. 829, l. 41-46. Riddle, Abs. p. 371, l. 30-32.

(k)

Caldwell, Abs. p. 833, l. 34. Cecil, Abs. p. 834, l. 41-43. Fitzgerald, Abs. p. 833, l. 18. Hanley, Abs. p. 840, l. 4-5. Parker, Abs. p. 838, l. 27-28, 40. Smyth, Abs. p. 826, l. 33-34.

(l)

Brenton, Abs. p. 841, l. 34; p. 842, l. 5-25. Caldwell, Abs. p. 833, l. 34-45. Cecil, Abs. p. 834, l. 34; p. 835, l. 23-29. King, Abs. p. 836, l. 10-17, 33-34; p. 835, l. 38-40. Smyth, Abs. p. 826, l. 42-44; p. 827, l. 6-8; p. 828, l. 1-2.

(m)

Brenton, Abs. p. 841, l. 28-39; p. 842, l. 5-25. Cecil, Abs. p. 835, l. 23-29, 1-5. Dunn, Abs. p. 837, l. 20-23; p. 838, l. 8-11. Hanley, Abs. p. 832, l. 13-15; p. 839, l. 41-43. Hughet, Abs. p. 841, l. 11-14. Parker, Abs. p. 838, l. 45-46. Smith, Abs. p. 760, l. 32-35. Ware, Abs. p. 844, l. 27-44. Whiting, Abs., p. 349, l. 30-31. Witzel, Abs. p. 831, l. 14.

(n)

Caldwell, Abs. p. 833, l. 37-38. Campbell, Abs. p. 848, l. 35; p. 846, l. 5. Cecil, Abs. p. 835, l. 17-18. Hanley, Abs. p. 832, l. 15-17; p. 839, l. 43-46. Hembree, Abs. p. 845, l. 19-21. Hibbard, Abs. p. 847, l. 41-45; p. 848, l. 1. Witzel, Abs. p. 831, l. 12-16.

(o)

Bardwell, Abs. p. 839, l. 23-28. Gardner, Abs. p. 826, l. 12-16. Hibbard, Abs. p. 848, l. 6-9; p. 847, l. 41-45. Kilburn, Abs. p. 836, l. 46; p. 837, l. 2. Ortego, Abs. p. 829, l. 13-15. Parker, Abs. p. 838, l. 31-38; p. 420, l. 37-39. Smith, Abs. p. 827, l. 8-11. Whiting, Abs., p. 812, l. 3.

(p)

Bollenbaugh, Abs. p. 846, l. 3-23; p. 847, l. 1-32. Campbell, Abs. p. 848, l. 33-35; p. 849, l. 4-5. Hembree, Abs. p. 844, l. 45-48; p. 845, l. 1-15. Pecore, Abs. p. 851, l. 5-13. Smith, Abs. p. 843, l. 1-5. Ware, Abs. p. 843, l. 9-45; p. 844, l. 1-7, 16-32.

(q)

Baker, Abs. p. 824, l. 1-31. Caldwell, Lee Minis, Abs. p. 823, l. 28-31. Caldwell, Mrs. Myrtle, Abs. p. 825, l. 41. Dunn, Abs. p. 824, l. 34-44; p. 825, l. 2-3. Elliott, Abs. p. 825, l. 5-11. Ortego, Abs. p. 823, l. 34-38. Ware, Abs., p. 825, l. 32.

(r)

Elliott, Abs. p. 806, l. 26. Hibbard, Abs. p. 853, l. 13-24. McGee, Abs. p. 820, l. 9-15. Pecore, Abs. p. 807, l. 3; p. 819, l. 1-2; p. 820, l. 1-5. Witzel, Abs. p. 852, l. 42-46.

(s)

Bardwell, Abs. p. 839, l. 30-35. Caldwell, Abs. p. 834, l. 24-26. Dunn, Abs. p. 837, l. 36-45; p. 837, l. 1-3, 15-20, 26-31. Hanley, Abs. p. 832, l. 30-32; p. 855, l. 15-17. Ortego, Abs. p. 830, l. 14-25. Smyth, Abs. p. 828, l. 23-40. Witzel, Abs. p. 832, l. 1-4.

26

The State of Oregon excepts to that part of proposed finding XXIV submitted to this Court by the Special Master for approval set forth on page 124 of

the Report of the Special Master reading as follows:

> "At the time of the commencement of this action and for a long period of time prior thereto the waters within the Meander Boundary Line were all shallow."

*

The Master should have held and found and submitted for approval a proposed finding instead of Finding XXIV, set forth on page 124 of the Report of the Special Master, as follows:

> "At the time of the commencement of this action and in the years 1888, 1889, 1918, 1919, 1930, 1931 and 1932, the waters within the meander line boundary were all shallow due to drought conditions."

27

The State of Oregon excepts and objects to that part of proposed finding XXX submitted by the Special Master to this Court for approval set forth on page 129 of the Report of the Special Master, which proposed finding is as follows, to-wit:

> "It is not true (Amended Answer, Counterclaim, par. V. pp. 44-45) that at the time of the Admission of Oregon into the Union or at any time thereafter Malheur, Mud and Harney Lakes were or that any of them, was a body of water varying in depth different from the depths elsewhere herein stated or that any portion of any of them ever had a depth of seventeen feet or any depth exceeding about six feet and then only in the deepest portions."

*

The Master should have found and held and sub-

mitted instead of his finding XXX, set forth on page 129 of the Report of the Special Master, a finding as follows:

> "At the time of the admission of Oregon into the Union and until the Sand Reef broke through in 1881, and from time to time thereafter, Malheur, Mud and Harney Lakes, and each of them were a body of water varying in depth up to 4105 feet above sea level."

28

The State of Oregon excepts to that part of proposed finding XXX submitted to this Court by the Special Master for approval, set forth on page 129 of the Report of the Special Master reading as follows:

> "No one of said lakes was of the maximum depth alleged in the Amended Answer during any season of high-water."

*

The Master should have submitted, instead of his proposed Finding XXX, set forth on page 129 of the Report of the Special Master, a finding as follows:

> At the time Oregon was admitted into the Union and up to the year 1881 and for a number of years thereafter, the waters of said lake stood at a maximum depth during high water of 17 feet above the lowest portion of Malheur Lake, to-with, an elevation of approximately 4105.

29

The State of Oregon excepts and objects to that part of the proposed finding XXX submitted to this Court for approval by the Special Master set forth on page 129 of the Report of the Special Master reading as follows:

"It is not true that on February 14, 1859, or at any time thereafter, the waters of Malheur Lake and Mud Lake at ordinary recurring seasons of high water stood substantially at a level near the top of the Sand Reef. (Amended Answer p. 22)

*

The Master should have submitted instead of his proposed Finding XXX, set forth on page 129 of the Report of the Special Master, a finding as follows:

"That on February 14, 1859, and until 1881, when the Sand Reef was broken through, the waters of Malheur Lake and Mud Lake at ordinary recurring seasons of high water stood substantially at a level with the top of the Sand Reef."

(See witnesses under Exception 25, supra).

30

The State of Oregon excepts and objects to that part of the proposed finding of the Special Master submitted to this Court for approval and set forth on page 129 of the Report of the Special Master reading as follows:

"It is not true that mean or ordinary high water during many years passed has reached the Meander Line Boundary. (Amended Answer, pp. 15, 32, 44-45)."

*

The Master should have submitted instead of proposed Finding of Fact above stated, a finding as follows:

"Mean or ordinary high water during many years past has reached the meander line boundary."

Hibbard, Abs. p. 990, l. 30-33.

31

The State of Oregon excepts and objects to the proposed finding XXXII submitted by the Special Master to this Court for approval set forth on page 130 of the Report of the Special Master wherein the Special Master submits for the Court's approval the finding

> "It is not true that the Silvies River . . . . was or is now in its natural state used or susceptible or capable of being used as a highway for commerce over which trade and/or travel are or may be conducted in the customary mode of trade or travel on water, to from or between any points within the Meander Line Boundary. (Amended Answer pages 23-24)."

Hibbard, Abs. p. 990, l. 30-33.

32

The State of Oregon excepts and objects to the proposed finding XXXIII submitted to this Court by the Special Master for approval and set forth on page 130 of the Report of the Special Master, and which proposed finding is as follows, to-wit:

> "It is not true that any of the waters dealt with in the Amended Answer, at any time has been or now is used to carry products by row boats or flat boats or gasoline launches, or to transport any products of commerce or to afford means of travel in any of the area here involved or in the region adjoining the same. (Amended Answer page 24.)"

The Master should have found and submitted in place of the proposed Finding XXXIII, set forth on page 130 of his Report, a finding as follows:

"The waters dealt with in the Amended Answer, at all times past, except in the years 1888, 1889, 1918, 1919, 1930, 1931 and 1932, have been and now are susceptible of being used to carry products by row boats, flat boats and gasoline launches, and to transport products of commerce and have and do afford means of travel in any of the area involved herein and the region adjoining the same."

(See witnesses under Exceptions 14 and 15, supra.)

33

The State of Oregon excepts and objects to the proposed finding submitted by the Special Master to this Court for approval numbered XXXIV and set forth on page 130 of the Report of the Special Master reading as follows:

"It is not true, that any portion of the area within the Meander Line Boundary, either was or would have been under any conditions whatever, or particularly if there had been a full flow from the rivers discharging therein, capable or susceptible of being used as highways for commerce over which trade or travel might be conducted in the customary modes of trade and or travel on water. (Amended Answer page 24.)"

*

The Master should have found and submitted instead of proposed Finding XXXIV, set forth on page 130 of his Report, a finding as follows:

"The area within the Meander Line Boundary was on February 14, 1859 and ever since has been capable and susceptible of being used as highways for commerce over which trade and travel

might be conducted in the customary modes of trade and/or travel on water."

Clark, Abs. p. 464, l. 4-5, 10-11. Cooper and Dodge, Abs. p. 1089, l. 16-47; p. 1090, l. 1-34. Dunn, Abs. p. 493, l. 24-31. Graves, Abs. p. 593, l. 35-45. Hamilton, Abs. p. 437, l. 36-48. Pecore, Abs. p. 612, l. 25-27. Sizemore, Abs. p. 938, l. 39 to p. 9[illegible] l. 9. Smyth, Abs. p. 403, l. 6-10. Springer, Abs. p. 470, l. 15-36. Thompson, Abs. p. 408, l. 21-41; p. 410, l. 11-13. Plaintiff's Exhibit 52, Abs. p. 76. Jessup report, Appendix A.

(See witnesses under Exception 25, supra).

34

The State of Oregon excepts and objects to the use of the words "in earlier times," "but only negligible quantities of" and "were," set forth in that part of the proposed finding XXXIV submitted to this Court for approval by the Special Master set forth on pages 130 and 131 of the Report of the Special Master, and which finding should read as follows:

"It is true that from the admission of Oregon into the Union game birds were found therein, and vast numbers ever since have found their habitat there, but only negligible quantities of game fish were ever found therein."

Bendire, Abs. p. 750-754, Plaintiff's Exhibit 42. Finley, Abs. pp. 960-963. Hanley, Abs. p. 717, l. 38-44. Heinz, Abs. p. 957, l. 14. Jewett, Abs. pp. 957-960. Martin, Abs. p. 957.

35

The State of Oregon excepts and objects to that part of the proposed finding XXXV submitted by the

Special Master to this Court for approval, found on page 131 of the Report of the Special Master, reading as follows:

> "It is not true that until August 18, 1908, large numbers of persons used the lakes and the waters thereof and traversed the same with row boats or gasoline launches for the purpose of fishing or hunting or traveling thereon, although there were occasional use of the same for fishing and hunting by the neighborhood in periods of high water but not for purposes of commerce except trapping for a short time."

*

The Master should have found and submitted in place of a proposed Finding XXXV, found on page 131 of his Report, a finding as follows:

> "Until August 18, 1908, large numbers of persons used the lakes and waters thereof and traversed the same with row boats and gasoline launches for the purpose of hunting and traveling thereon, and for the purposes of commerce, including the taking and transportation of fur-bearing animals and wild water fowl thereon." (See witnesses under Exceptions 14 and 15, supra.)



The State of Oregon excepts and objects to that portion of proposed finding XXXV submitted to this Court by the Special Master for approval, and set forth on page 131 of the Report of the Special Master, and reading as follows:

> "And it is not true that the area within the Meander Line Boundary, or any part thereof, at the time of or prior to the admission of Oregon into the Union was used or capable or susceptible

of being used to any practical or commercial degree for sailing, rowing, fishing, fowling, trapping, bathing, skating, the taking of water for domestic or agricultural purposes, or the cutting of ice or the transportation of fish or game or the products of the field or forest."

*

The Master should have found and submitted instead of the proposed Finding XXXV, set forth on page 131 of the Master's Report, a finding as follows:

"The area within the Meander Line Boundary, at the time of and prior to the admission of Oregon into the Union was used and capable and susceptible of being used practically and commercially for sailing, rowing, fishing, fowling, trapping, bathing, skating, the taking of water for domestic and agricultural purposes, and the cutting of ice and the transportation of fish and game and the products of the field and forest."

(See witnesses under Exceptions 14 and 15, supra.)

37

The State of Oregon excepts and objects to the proposed finding XXXVI submitted by the Special Master to this Court for approval and set forth on page 131 of the Report of the Special Master, and which proposed finding is as follows, to-wit:

"It is not true that since the Executive Order of August 18, 1908, the plaintiff has caused its agents and/or wardens, to patrol the areas within the Meander Line Boundary with row boats or gasoline launches, or to cause them to conduct and carry great numbers of the public over the area within the Meander Line Boundary, or portions of the river flowing therein, in gasoline

39

launches for pleasure and/or for the purpose of sightseeing, but row boats and two gasoline launches have been used periodically and in time of high water in relatively small portions of the Malheur Lake Division and row boats have been used occasionally on Mud and Harney Lakes in periods of high water."

*

The Special Master should have found and submitted in place of the proposed Finding XXXVI, set forth on page 131 of the Report of the Special Master, a finding as follows:

"Since the Executive Order of August 18, 1908, the plaintiff has caused its agents and/or wardens, to patrol the areas within the Meander Line Boundary with row boats and gasoline launches, and to cause them to conduct and carry great number of the public over the area within the Meander Line Boundary, and portions of the river flowing therein, in gasoline launches for pleasure and for the purpose of sightseeing."

Benson, Abs. p. 620, l. 34-46; p. 672; l. 3-10; p. 1000, l. 6-24; p. 1001, l. 1-5.

**The Mud Lake Division**

(Report of the Special Master, pp. 127 128).

38

The State of Oregon excepts to the failure and refusal of the Special Master to make a finding of fact and incorporate the same into his report as set forth in the requested finding by the State of Oregon marked subdivision (a) and which requested finding

is set forth in proposed finding XXVIII submitted by the Special Master for approval to this Court found on page 127 and 128 of the Report of the Special Master.

(See witnesses under Exception 15, supra.)

39

The State of Oregon excepts to the failure and refusal of the Special Master to make a conclusion of law as requested in the proposed request for a conclusion of law numbered (1) and set forth in proposed finding XXVIII submitted by the Special Master to this Court for approval and set forth on page 128 of the Report of the Special Master, which requested conclusion of law is as follows:

> "(1) I find that at the date of admission of the State of Oregon into the Union on February 14, 1859, and ever since, that the waters within the Meander Line Boundary of the Mud Lake Division herein described were and still constitute navigable and public waters."

40

The State of Oregon excepts to the failure and refusal of the Special Master to make a conclusion of law as requested by the State of Oregon, which requested conclusion of law is numbered (2) and is set forth in finding XXVIII in the finding submitted to this Court for approval by the Special Master, set forth on page 128 of the Report of the Special Master, which requested finding was as follows, to-wit:

> "(2) Based upon the findings herein contained, I find that the title of the bed of the Mud Lake Division within the Meander Line Bound-

ary thereof as described in these findings, and up to ordinary high-water mark thereof, is owned by the State of Oregon."

41

**The Other Divisions.**

(Report of the Special Master, p. 128).

The State of Oregon excepts to the failure and refusal of the Special Master to make similar requested findings of fact and conclusions of law as those numbered (a), (b), (1), (2), and set forth in proposed finding XXVIII on pages 127 and 128 of the Report of the Special Master submitted to this Court for approval, with reference to each of the other five Divisions namely, Malheur Lake Division, the Narrows Division, the Sand Reef Division and the Harney Lake Division.

**Were there Stable Lands Constituting Islands and/or Promontories Within the Area Involved on February 14, 1859.**

(Report of the Special Master, p. 25)

42

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that at the admission of Oregon all lands above the water surface elevation of 4093 on that day were stable lands and ever since have been and now are owned in fee simple absolute by the United States.

A formal statement of said last quoted finding and conclusion appears in subdivision 4 on page 66 of the Report of the Special Master.

*

The Master should have held and found that no portion of the areas involved within the Meander Line Boundary constituted stable lands; and should have found that no portion thereof are owned by the United States.

Baker, Abs. p. 316, l. 31-46. Benson, Abs. p. 672, l. 25-27. Buchanan, Abs. p. 319, l. 14. Caldwell, Abs. p. 648, l. 1-10. Carey, Abs. p. 318, l. 30. Cawlfield, Abs. p. 329, l. 5-25. Darsey, Abs. p. 644, l. 1-12. Elliott, Abs. p. 993, l. 25, 40. Farrier, Abs. p. 329, l. 27-45. Finley, Abs. p. 671, l. 34-46; p. 346, l. 34. Hibbard, Abs. p. 326, l. 31-46; p. 990, l. 27-32. Hill, Abs. p. 326, l. 2-4. Kilburn, Abs. p. 318, l. 10-15. Marshall, Abs. p. 332, l. 31. Pecore, Abs. p. 674, l. 39-44. Whiting, Frank, Abs. p. 333, l. 32. Whiting, George, Abs. p. 334, l. 10, 13; p. 316, l. 12; p. 372, l. 44-46; p. 373, l. 1, 8-12. Heinz, Abs. p. 330, l. 10-22; p. 998, l. 46, 17, 32; p 997, l. 30-40, l. 7-12; p. 957, l. 12-33, l. 40, 42; p. 330, l. 10-20.

U. S. Geological Survey Bulletin No. 252, cited in Plaintiff's Exhibit 52, pp. 38-40, Jessup Report.

Plaintiff's Exhibits 3, 3A, 4 and 4A.

Report of the Special Master; Volume 2, pp. 75-80, Appendix 14.

Id. p. 84-87, Appendix 16.

43

The State of Oregon excepts and objects to the recommendation of the Special Master appearing in sub-

division numbered 3 on page 133 of the Report of the Special Master reading as follows:

> "At the admission of the State of Oregon into the Union there were stable lands constituting islands or promontories within the area involved."

*

The Master should have held that at the admission of the State of Oregon into the Union there were no stable lands constituting islands or promontories within the area involved.

(See witnesses under Exception 42, supra.)

44

The State of Oregon excepts and objects to the recommendation of the Special Master appearing in subdivision numbered 3 on page 133 of the Report of the Special Master, that a decree be entered herein decreeing that "at the admission of the State of Oregon into the Union on February 14, 1859, all lands above the water surface elevation of 4093" were stable lands and ever since have been and now are owned in fee simple absolute by the United States of America (except stable lands within the Narrows Division, if any).

*

The Master should have recommended in place of that portion of the proposed decree numbered subdivision No. 3 on page 133 of the report a provision as follows:

> "3. At the admission of the State of Oregon into the Union on February 14, 1859, and at all times since, all lands above elevation 4093 were

unstable lands, and a part of the bed of the lakes."

(See witnesses under Exception 42, supra.)

45

The State of Oregon excepts and objects to the report and finding of the Special Master as follows:

> "The acreages above 4093 are not generally compact bodies although there are two well-known islands, Pelican Island, 840 acres, and Cole Island, 350 acres, within the Malheur Lake Division. Other islands, unnamed and unsurveyed within that Division aggregate 4921.6 acres. The promontories therein aggregate 1880 acres; thus giving the total 7991.6 acres above 4093.
>
> "These islands and promontories are stable lands, and the Conclusions of Law declare them to be the property of the United States (in any and all events)."

A formal statement of said last quoted finding and conclusion appears on page 25 subdivision (3) of the Report of the Special Master.

*

The Master should have found and held that the areas above elevation 4093 on February 14, 1859 were and ever since have been a part of the bed of the lakes.

(a)

* Brown, Abs. p. 281, l. 28. Carey, Abs. p. 291, l. 21. Catterson, Abs. p. 283, l. 1. Dunn, Abs. p. 287, l. 14. Finley, Abs. 283, l. 9-16. Fitzgerald, Abs. p. 280, l. 27. Martin, Abs. p. 281, l. 14-15. McGowan, Abs. p. 282, l. 11. Pecore, Abs. p. 275, l. 30-35. Sizemore, Abs. p. 281, l. 4.

(b)

McConnell, Abs. p. 305, l. 28. Pecore, Abs. p. 293, l. 18, 5-14.

(c)

Darsey, Abs. p. 302, l. 14.35. Dunn. Abs. p. 300, l. 36. Gardner, Abs. p. 298, l. 31. Jewett, Abs. p. 302, l. 46. McGowan, Abs. p. 301, l. 31.

(d)

Gardner, Abs. p. 298, l. 31. Jewett. Abs. p. 303, l. 1. Marshall, Abs. p. 299, l. 37.

(e)

Catterson, Abs. p. 302, l. 8. Cawlfield, Abs. p. 302, l. 26. Comegys, Abs. p. 300, l. 28. Darsey. Abs. p. 302, l. 26. Dunn, Abs. p. 300, l. 36; p. 301, l. 9-12. Gardner, Abs. p. 298, l. 32. Marshall, Abs. p. 299, l. 38. McGowan, Abs. p. 301, l. 32. Pecore. Abs. p. 303, l. 9. Sizemore, Abs. p. 299, l. 35. Springer, Abs. p. 301, l. 21.

(f)

Comegys, Abs. p. 300, l. 28.

(g)

Comegys, Abs. p. 300, l. 31. Dunn. Abs. p. 301, l. 9. Hibbard, Abs. p. 313, l. 19. Jewett, Abs. p. 303, l. 2. Marshall, Abs. p. 308, l. 31. Sizemore. Abs. p. 299, l. 33. Springer, Abs. p. 309, l. 13. Witzel, Abs. p. 305, l. 9.

(h)

Marshall, Abs. p. 299, l. 38. Springer, Abs. p. 300, l. 20.

(i)

Dunn, Abs. p. 300, l. 37. Hibbard. Abs. p. 301, l. 42.

46

The State of Oregon excepts and objects to the proposed finding as follows:

"All of the lands within the five Divisions above

the elevation of 4093 are permanent lands and constitute islands and/or promontories."

A formal statement of said last quoted finding and conclusion appears in proposed finding XXII submitted to this Court for approval by the Special Master and set forth on page 119 of the Report of the Special Master.

*

The Master should have held and found that there are no permanent lands or islands or promontories within the five Divisions; that none of the areas which were uncovered when the water was at elevation 4093 was of the nature or of sufficient height or size to be or constitute stable islands and/or promontories, and that the United States has no title thereto.

(See witnesses under Exception 42, supra.)

47

The State of Oregon excepts and objects to the finding of the Special Master that "The water surface elevation has never been consistent."

A formal statement of said finding appears on page 22 of the Report of the Special Master.

*

The Master should have found and held that except in the dry years of 1888, 1889, 1918, 1919, 1930, 1931, 1932, the waters of Malheur Lake consistently came back and flooded the Neal line (mean elevation 4093) and 83.9 per cent of all of the bed of the lake within the Neal meander line was covered with water when the elevation was at 4093, and was consistently enough

higher than that so that the waters of the lakes stood over and flooded substantially all of the higher portions within the lake, except those portions of Cole Island, Pelican Island and Graves Ridge or Island, if any, which projected above the water when the waters stood at the several heights set forth on page 80 of the Report of the Special Master Volume 2.

The Master should have further found and held that except for the dry seasons above mentioned the evidence conclusively establishes that the waters of Malheur Lake each season rose high enough to cover substantially all of the higher portions of the bed of the lake, the so-called islands or knolls, and that wild vegetation was consistently, regularly and yearly raised thereon, when the waters fell during the summer months due to evaporation and the flowing of water into the sump of Harney Lake, and that the nature of the wild vegetation was such that it required the standing waters of the lake to grow and mature a crop and after 1881 except for said years there always was a crop unless as happened in some years when there was too much water.

Alberson, Abs. p. 322, l. 46. Baker, Abs. p. 335, l. 1; p. 377, l. 32-44, 18-30. Caldwell, Abs. p. 396, l. 23-25. Campbell, Abs. p. 552, l. 42; p. 555, l. 22. Carey, Abs. p. 340, l. 10. Comegys, Mrs., Abs. p. 777, l. 35. Comegys, Abs. p. 778, l. 1-3, 29, 39-41. Dillman, Abs. p. 585, l. 15, 19-22. Donegan, Abs. p. 571, l. 40-47; p. 572, l. 1-9. Dunn, Wm. J., Abs. p. 805, l. 8, 24. Dunn, Mrs., Abs. p. 494, l. 15. Elliott, Abs. p. 772, l. 47; p. 784, l. 3-11. Gardner, Abs. p. 355, l. 22-25, 27; p. 480, l. 4-7. Haley, Abs. p. 689, l. 37-39. Hamilton, Abs. p. 787, l. 16-21.

Hembree, Abs. p. 763, l. 8-15; p. 764, l. 45-48; p. 423, l. 45-48; p. 765, l. 34-36; p. 776, l. 41-42, 44; p. 776, l. 31-33. Huffman, Abs. p. 576, l. 11-15. Irving, Abs. p. 363, l. 4-17. Johnson, p. 320, l. 42; p. 321, l. 6; p. 341, l. 45. King, Abs. p. 356, l. 50. McGowan, Abs. p. 344, l. 6-18; p. 573, l. 28-33. Peterson, Abs. p. 187, l. 3. Sizemore, Abs. p. 327, l. 40, 42-43. Smith, R. A., Abs., p. 787, l. 36-39; p. 788, l. 4-6, 13-14; p. 789, l. 10-13, 34-36; p. 791, l. 1-5, 6-7. Smyth, D. H., Abs. p. 365, l. 18-19; p. 365, l. 44; p. 366, l. 3. Thompson, Abs., p. 187, l. 17-20. Turner, Abs. p. 328, l. 14. Vickers, Abs., p. 347, l. 40; p. 348, l. 1; p. 602, l. 18. Ware, Abs. p. 789, l. 34-36; p. 790, l. 30, 34-36.

48

The State of Oregon excepts and objects to the finding of the Special Master that the line of ordinary or high mean water on February 14, 1859, was at a mean elevation of 4093 above sea level.

A formal statement of said last quoted finding and conclusion appears on page 21 of the Report of the Special Master, lines 26 to 29 inclusive. It also appears in finding XXII on page 118 of the Report of the Special Master.

The Master should have found and held that the line of ordinary or mean high water on February 14, 1859, was at elevation 4105 feet above sea level.

(See witnesses under Exceptions 18 and 25, supra.)

49

The State of Oregon excepts and objects to the proposed finding of the Special Master XXII submitted

to this Court for approval and set forth on page 118 of the Report of the Special Master wherein he finds and concludes that the line of ordinary or mean high-water on February 14, 1859, was at a mean elevation of 4093 feet above sea level.

*

The Master should have held and found that the line of ordinary or mean high water on February 14, 1859, was at a mean elevation of not less than 4105 feet above sea level.

(See witnesses under Exceptions 18 and 25, supra.)

**The Narrows Division—Found by the Special Master to be a Non-Navigable Stream.**

(Report of the Special Master, pp. 68, 69)

50

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the terms of the Act of May 18, 1796 (1 Stats. 464) now embodied in R. S. Sec. 2476 rules or has any bearing on the title of the lands involved in the Narrows Division, or any bearing or application to this case whatsoever.

A formal statement of said finding and conclusion appears on page 68 of the Report of the Special Master.

* *

The Master should have held and found that the terms of said section 2476 R. S. do not apply to nor do they govern the question of the title of the bed

of a stream after the uplands have been granted or patented.

51

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 9 on page 135 of the Report of the Special Master, that a decree be entered herein decreeing:

> "(The question whether the rule of Hardin v. Jordan applies to indemnity lands is of no importance here for the matter is governed by Section 2476 R. S.)"

The Master should have recommended in lieu of subdivision numbered 9 on page 135 of the Report, in lieu of that portion thereof in brackets, a decree as follows:

> (The provisions of Section 2476 R. S. has no application after the lands have been granted by the United States. (Hardin v. Shedd, 190 U. S. 508, 519, l. 21).)

52

The State of Oregon excepts to the failure of the Special Master to find and conclude that all that portion of the lands constituting the Narrows Division underlie navigable waters.

53

The State of Oregon excepts to the failure of the Special Master to find and conclude that all of the lands of the Narrows Division up to ordinary high water mark are owned by the State of Oregon, constituting all of the Narrows Division.

54

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the State of Oregon has no interest in subdivision A of the Narrows Division (between the Bridge and the Malheur Lake Division).

A formal statement of said last quoted finding and conclusion appears on page 69 of the Report of the Special Master.

55

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the upland proprietors in subdivision A of the Narrows own the bed and banks within the meander lines of that subdivision of the Narrows Division.

A formal statement of said finding and conclusion appears on page 68 of the Report of the Special Master.

*

The Master should have found that the Narrows was a navigable stream, and the title to the bed thereof is in the State of Oregon.

56

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that Oregon has an aliquot part of the bed and banks of subdivision B of the Narrows Division corresponding to the frontage owned by it thereon.

A formal statement of said last quoted finding and conclusion appears on page 69 of the Report of the Special Master.

The Master should have held and found that the State of Oregon was the owner of the bed of Subdivision B of the Narrows Division, and that said stream is a navigable stream.

57

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the United States has or may have an easement whereby the waters of Malheur Lake may pass over Subdivision A, the Narrows Division.

A formal statement of said last quoted finding and conclusion appears on page 69 of the Report of the Special Master.

The Master should have held and found that the title to the waters of Malheur Lake is in the State of Oregon, and subject to the regulation and control of the State, and that flowing waters create no easement in the United States.

58

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the United States has or may have an easement whereby the waters of Malheur Lake may pass over subdivision B of the Narrows Division.

A formal statement of said finding and conclusion appears on page 69 of the Report of the Special Master.

The Master should have held and found that the

title to the waters are in the State of Oregon and that flowing waters create no easement in the United States.

59

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 20 on page 137 of the Report of the Special Master, that a decree be entered herein decreeing:

> "The determination of the ownership of the area involved made by this Decree is subject to any easements (for the flow of water from one subdivision to another or others, or for any other purposes) which may exist."

*

Subdivision numbered 20 on page 137 of the Report of the Special Master should be eliminated for the reason that the title to the waters is in the State of Oregon, and subject to its regulation and control.

**Was the Meander Line (81.098 Miles) Laid Down by J. H. Neal in 1895-1896, and Approved in 1897 a Correct Line.**

(Report of the Special Master, p. 25)

60

The State of Oregon excepts and objects to the report and finding of the Special Master as follows:

> "The United States challenges the correctness of the Neal line as a whole (81.098).

A formal statement of said last quoted report and

finding appears on page 27 of the Report of the Special Master.

*

The Master should have found that the correctness of the Neal Meander line was not in issue under the allegations in plaintiff's Bill of Complaint nor was it put in issue on the trial. (Joint Abstract of Record, Vol. I, p. 239).

(a)

Ausmus, Abs. p. 230, l. 29-35. Benson, Abs. p. 240, l. 19, 32, 22, 25, 26; p. 241, l. 1, 10, 41. Buchanan, Abs. p. 190 l. 40-48; p. 191 l. 22, 32; p. 427 l. 6-11. Clark, Abs. p. 192 l. 25. Comegys, Abs. p. 202, l. 20-45; p. 206, l. 3, 6. Culp, Abs. p. 220 l. 15, 20, 29, 46; p. 221 l. 12. Drinkwater, Abs. p. 222 l. 5-13. Dunn, W. J., Abs. p. 189 l. 7, 12, 20. Dunn, Abs. p. 217 l. 28, p. 219 l. 1. Elliot, Abs. p. 236 l. 40. Hayes, Abs. p. 198 l. 1. Lewis, Abs. p. 187 l. 45; p. 188 l. 9, 30, 45. Marshall, Abs. p. 211 l. 19, 26. Marshall, Abs. p. 227 l. 7; p. 228 l. 15, 25. McGowan, Abs. p. 207 l. 35. Otley, Abs. p. 235 l. 37; p. 236 l. 6-12. Pecore, Abs. p. 184 l. 42; p. 185 l. 29; p. 186 l. 3, 15, 25. Peterson, Abs. p. 186 l. 42; p. 187 l. 6. Sizemore, Abs. p. 209 l. 1, 13, 34. Staley, Abs. p. 241 l. 33. Thompson, Abs. p. 187 l. 15, 30, 39. Triska, Abs. p. 233 l. 8; p. 234 l. 2-9. Witzel, Abs. p. 193 l. 3. Wise, Abs. p. 224, l. 7, 18.

(b)

Baker, Abs. p. 378 l. 5-9. Benson, Abs. p. 243 l. 9-15, 16-24, 32-37. Brandon, Abs. p. 431, l. 39; p. 652 l. 46; p. 441, l. 4-9. Brown, Abs. p. 436 l. 27; p. 440 l. 39-44. Buchanan, Abs. p. 428 l. 10-14, 15-26; p. 429 l. 1-12. Bunyard, Abs. p. 442 l. 37. Caldwell, Abs. p. 647, l. 45. Catterson, Abs. p. 660, l. 2; Abs. p. 283 l. 1. Comegys,

Abs. p. 526, 13; 660 l. 25, 42; p. 203 l. 1-19. Dodge, Abs. p. 238, l. 49-52; p. 239, l. 1-11. Dunn, Abs. p. 217 l. 47; p. 218 l. 1; p. 663 l. 17, 22; p. 664 l. 16; Fitzgerald, Abs. p. 647, l. 5, 11; p. 280 l. 27. Fry, Abs. p. 440 l. 20, 39-43; p. 441 l. 34-35; p. 442 l. 1-2, 6-12. Graves, Abs. p. 229 l. 15-22. Hibbard, Abs. p. 644 l. 43; p. 645 l. 1, 6, 9, 15; p. 282 l. 32. Howser, Abs. p. 638 l. 1. Hughitt, Abs. p. 475 l. 40. King, Abs. p. 638 l. 34. Marshall, Abs. p. 212 l. 24-25. McGowan, Abs. p. 666 l. 31, 40; p. 184 l. 7-16. McGowan, Abs. p. 184 l. 7; Abs. p. 282 l. 11. Pecore, Abs. p. 676 l. 21. Sizemore, Abs. p. 281 l. 4. Spurlock, Abs. p. 537 l. 36; p. 541 l. 11; p. 217 l. 1-3; p. 218 l. 1; p. 219 l. 7-16. Thompson, Abs. p. 456 l. 39-41; p. 206 l. 37-45; p. 655 l. 17. Turner, Abs. p. 661 l. 45; p. 213 l. 46; p. 282 l. 3.

(c)

Plaintiff Exhibits 39-A to 39-K. Plaintiff Exhibit 40. Plaintiff Exhibit 38, Abs., p. 176 l. 33-35; p. 177 l. 6-8; l. 33-42. Plaintiff Exhibit 41, Abs. p. 178; p. 179 l. 21-25; p. 182 l. 20-23.

**Were there Relicted Lands within the Meander Line Boundary at the Commencement of the Suit.**

(Report of the Special Master, p. 28)

61

The State of Oregon excepts and objects to the finding of the Special Master that "During most of each year from 1918 to 1931, except the years 1921, 1922 and 1928, the recession of the waters of Malheur Lake was practically complete."

A formal statement of said finding above excepted to, appears on page 3 of the Report of the Special Master.

*

The Master should have found and held that there is no permanent recession, and that only in the years 1930 and 1931 did the waters of Malheur Lake temporarily disappear, due to evaporation and extreme lack of precipitation, and the lake bed become dry.

(See witnesses under Exception 67, infra.)

62

The State of Oregon excepts and objects to the finding of the Special Master as follows:

> "The region has been dry for years and the experience of an actual inspection of the area involved on November 1, 1931, has been already related (supra; p. 13)."

A formal statement of said last quoted finding and conclusion appears on page 23 of the Report of the Special Master.

*

The Master should have found the region never was completely dry until the year 1931, and that it was only partially dry in the years 1888, 1889, 1918, 1919, 1930 and 1932, and that in all other years the waters were high enough to cover the higher portions of the bed within the lakes and permit hay to be cut therefrom except some years when there was too much water, when the so called islands or knolls were not uncovered during the dry season of the several years.

(See witnesses under Exception 67, infra.)

63

The State of Oregon excepts to the failure of the Special Master to find that there has been no permanent recession of the waters of any of the lakes involved in this suit.

(See witnesses under Exception 67, infra.)

64

The State of Oregon excepts to the failure of the Special Master to find that there has been no permanent recession of the waters of any of the lakes in the five divisions.

A formal statement of the finding and conclusion of the Special Master is set forth on page 31 of the Report of the Special Master, lines 17, 18 and 19.

(See witnesses under Exception 67, infra.)

65

The State of Oregon excepts to the failure of the Special Master to find that there are no relicted lands.

A formal statement of the finding of the Special Master is set forth on page 31 of the Report of the Special Master, line 19.

(See witnesses under Exception 67, infra.)

66

The State of Oregon excepts to the failure of the Special Master to make a finding that there has been no permanent reliction.

(See witnesses under Exception 67, infra.)

67

The State of Oregon excepts to the failure and

refusal of the Special Master to make a finding as requested by the State of Oregon and set forth in its special request marked (b), and which requested finding is set forth in the proposed finding submitted to this Court by the Special Master numbered XXVIII and set forth on page 128 of the Report of the Special Master.

Baker, Abs. p. 400, l. 21-28. Benson, Abs. p. 620, l. 40; p. 634, l. 26-34; p. 363, l. 1-8, 19-36; p. 637, l. 1-13; p. 1000, l. 10. Biggs, Abs. p. 927, l. 9-10; p. 607, l. 24. Brown, Abs. p. 931, l. 10-11. Buchanan, Abs. p. 191, l. 34-41. Campbell, Abs. p. 552, l. 42; p. 555, l. 22. Catterson, Abs. p. 583, l. 7-10; p. 930, l. 12-13; p. 931, l. 22-23, 26-27; p. 633, l. 16-20. Darsey, Abs. p. 380, l. 31-35; p. 588, l. 22-26. Donegan, Abs. p. 928, l. 18. Dunn, Abs. p. 189, l. 13. Dunn, Mrs., Abs. p. 942, l. 30-32. Gardner, Abs. p. 929, l. 21-22; p. 353, l. 21-25. Graves, Abs. p. 619, l. 10-12, 23-25; p. 592, l. 41-46. Griffin, Abs. p. 551, l. 21, 26. Hayes, Abs. p. 632, l. 25, 31-32, 35-41; p. 634, l. 32-34; p. 452, l. 25-28. Hibbard, Abs. p. 996, l. 35-45; p. 627, l. 7-15. Horton, Abs. p. 454, l. 35-48; p. 455, l. 1-4. Howser, Abs. p. 351, l. 15-17. Irving, Abs. p. 362, l. 7-10. Jessup, Abs. p. 1066, l. 29-31, 38-42. Kado, Abs. p. 928, l. 30-31; p. 611, l. 20-21. McKenzie, Abs. p. 634, l. 11-13. Otley, Abs. p. 600, l. 1-5. Springer, Abs. p. 948, l. 1-22; p. 470, l. 15-36. Smyth, D. H., Abs. p. 364, l. 46. Smyth, Geo. A., Abs. p. 403, l. 1, 2-3. Spurlock, Abs. p. 536, l. 17 p; 538, l. 30, 34. Thompson, Abs. p. 456, l. 6-16; p. 408, l. 19; p. 410, l. 27-45; p. 187, l. 30-40; p. 614, l. 26-37. Vickers, Thos. L., Abs. p. 928, l. 37-38; p. 613, l. 31; p. 620, l. 29. Vickers, Thos. J., Abs. p. 934, l. 12-14. Whiting, Abs. p. 929, l. 4-5. Plaintiff's Exhibit No.

52, Jessup report, Figures 1-16, inclusive. Report of the Special Master, Vol. 2, pp. 88-94, Appendix 17.

68

The State of Oregon excepts to the finding of the Special Master that this case can be decided without reference to reliction.

A formal statement of the finding of the Special Master is found on page 31 of the Report of the Special Master, lines 16-17.

(See witnesses under Exception 67, supra.)

69

The State of Oregon excepts and objects to the finding of the Special Master as follows:

> "It is to the interest of the owner of the bed to maintain that there are no relicted lands and as the plaintiff and, likewise, the defendant claims to be the owner of the bed a case is presented where the parties to the litigation have interests adverse to third persons not impleaded. While a finding of fact upon the point of reliction would not be technically binding upon third parties, in practical effect such a finding might come to the same end. Moreover the case can be decided without reference to reliction. I, therefore, do not find whether or not the recession of the waters is permanent; nor whether or not there are relicted lands."

A formal statement of said last quoted finding and conclusion appears on page 31 of the Report of the Special Master.

*

The Master should have found and held that there has been no recession of the waters, permanent or

otherwise; that the condition existing at the commencement of suit and time of trial was a temporary condition due to unusual lack of precipitation; and that the Master should have found that there are no relicted lands.

(See witnesses under Exception 67, supra.)

70

The State of Oregon excepts and objects to that portion of proposed finding XXV submitted to this Court for approval by the Special Master and set forth on page 125 of the Report of the Special Master reading as follows:

> "It is or may be to the interest of both plaintiff and defendant to maintain the position that there are no relicted lands but no finding is made upon that question as it is not necessary to the disposition of this suit that there should be a finding thereon and as that question affects the interests of persons not parties to the action no finding is made."

The Master should have found and held and submitted a finding, instead of proposed Finding XXV, set forth on page 125 of the Report of the Special Master, as follows:

> The evidence shows that no lands have been added to the uplands by reliction, and I find there is no permanent reliction of any of the portion of the bed within the meander line boundary.
>
> (See witnesses under Exception 67, supra.)

**Is the Common Law in Respect of the Effect of Conveyances of Lands Bordering on a Meandered Lake (i.e. That the Grantee Takes to the Center of a Lake) in Force in Oregon, or Does the Local Law Provide that the Grantee Takes Only to the Water's Edge.**

(Report of the Special Master, p. 33)

71

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the common law as declared in Hardin vs. Jordan, 140 U. S. 371 to the effect that the upland owner owns to the center of the lake, is in force in Oregon. lows:

(Report of the Special Master, p. 33.)

72

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as fo!-

"The common law of England is the law of Oregon (finding III, infra) and the question here is whether the common law has been departed from in respect of the subject here in hand."

A formal statement of said last quoted finding and conclusion appears on page 33, subdivision (I) of the Report of the Special Master, and Finding III appears on page 76 of the Report of the Special Master.

The Master should have found and held that the common law of England is not and never was the law of Oregon; that among the questions here is the question what is the law of Oregon, the local law.

73

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the

common law as understood by this court is the common law of Oregon.

A formal statement of said last quoted finding and conclusion appears in subdivision 2 on page 67 of the Report of the Special Master.

74

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that "The common law of England is the law of Oregon."

A formal statement of said last quoted finding and conclusion appears on page 33 of the Report of the Special Master.

*

The Master should have found and held that the principles of the common law of England have been adopted in the State of Oregon only so far as the same are applicable to the conditions existing in the State of Oregon and in consonance with the public policy, Constitution, statutes and usages of the state, and the rules of the common law as to riparian rights has always been subject to change and modification by statute in Oregon, and the common law doctrine of riparian rights have been abrogated and curtailed by constitutional and statutory provisions and the course of judicial decisions; that only so much of the common law as was compatible with the principles of the government of Oregon constituted a part of the law of the state when its Constitution was adopted; by Constitutional enactment which became effective when Oregon was admitted into the Union, such common law as so curtailed and modified and only so much thereof as was compat-

ible with the principles of the government of Oregon was adopted and this in turn was subject to alteration and repeal by the State of Oregon, and the Master should have further found that it was and is within the exclusive province of the state of Oregon by statute and/or judicial decision of its own courts to declare what such modified common law is.

In re Water Rights of Hood River, 114 Or. 112, 163, 166.
In re Willow Creek, 74 Or. 592, 623.
Perry vs. Fletcher, 93 Or. 43, 52, 54.
Runyan vs. Winstock, 55 Or. 202, 203-4.
Carson vs. Gentner, 33 Or. 512, 515-520.

75

The State of Oregon excepts and objects to the finding of the Special Master as follows:

> "I find nothing in the law of Oregon to show that there has been any departure in that State from the common law as announced in Hardin v. Jordan and Kean v. Calumet Canal Co. (supra), whereunder a grant of uplands *in particular form* invests the grantee with title from the water's edge to the center of the lake."

A formal statement of said last quoted finding and conclusion appears on page 35 of the Report of the Special Master.

*

The Master should have found and held that the rule of common law as enunciated in the cases mentioned, whereunder a grant of uplands without reservations or restrictions invests the grantee with title from the waters edge to the center of the lake, has not been adopted or followed in Oregon by judicial

decision or statute, and that the common law is not the local law of Oregon.

76

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "Oregon seeks to align herself with Illinois, but there does not seem to be any justification for that endeavor, unless it be in the Oregon lake legislation (1917-1931) found in the Amended Answer and Counterclaim and also in the Supplement to this report. The statutes were all enacted subsequent to every patent and grant involved in this case. We assume, therefore that the Oregon statutes do not alter the effect of the patents and grants made prior to that legislation and that there is nothing to the contrary in Great Northern R. Co. v. Sunburst Co., 287 U. S. 358."

A formal statement of said last quoted finding and conclusion appears on page 33 of the Report of the Special Master.

The Master should have found and held that Oregon, by statute or judicial decision of its own courts or both, has the right to declare the ownership of the beds of meandered lakes fronting the uplands which were granted or patented without reservations or restrictions, and the right to restrict the right to future reliction, a right which Illinois did not seek to exercise.

The Master should have found that it was immaterial that the statutes were all enacted subsequent to the patents and grants involved in this case, and

that the state of Oregon has the right through its courts without the aid or declaration of statutes to limit the title to upland owners on all lakes to the waters edge, and no Oregon court had prior to the enactment of the statutes involved recognized any right in the upland owner except the right of access, and until legislation had changed the rule of reliction, to lands uncovered by the permanent recession of the waters.

The Master should have held that the effect of the patents and grants to the beds of the lakes was to be determined by local law, such local law to be determined exclusively from the statutes of the State of Oregon and the decisions of *its* courts.

The Master should have held that the Oregon supreme court before the Oregon statutes were enacted twice refused to decide that the common law giving title to the upland owner to the center of the lake conceded by private litigants to be non-navigable, was in effect in Oregon and in other cases refused to make, as did the common law, private streams and ponds out of bodies of water useful to the public, but applied to such waters, the rule of public or navigable waters declared by the state of Minnesota in Lamprey vs State, 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670, and Fuller vs. Shedd, 161 Ill. 462, 44 N. E. 268, 33 L. R. A. 146, 52 Am. St. Rep. 394.

77

The State of Oregon excepts and objects to the finding and report of the Special Master as follows:

> "Prima facie, a state which has in terms adopted the common law as a basis for jurisprudence adheres thereto and if a litigant seeks to

show that the local rule is a departure from the common law, the burden should be upon him to make the fact clear."

A formal statement of said last quoted finding and conclusion appears on page 35 of the Report of the Special Master.

*

The Master should have found and held that the Common Law has not been adopted in terms or at all in Oregon, but has been modified and curtailed and only so much of its principles as are applicable to the conditions in the State of Oregon has been adopted in such state, and that the state of Oregon by judicial decision has refused to recognize the rule of the common law making private ponds and private property out of the waters and beds of non-navigable lakes.

78

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"This question turns upon rules of conveyancing, not upon rules of property. The question is whether by the law of Oregon dealing with conveyances the grantee of uplands takes to the center of the lake or takes to the water's edge."

A formal statement of the last quoted finding and conclusion appears on page 33 of the Report of the Special Master.

*

The Master should have found and held that a rule

of property was involved as well as a rule of conveyancing.

The Master should have found that one of the questions involved was whether the grantee of uplands takes to the center of the lake or takes to the waters edge.

79

The State of Oregon excepts and objects to the finding of the Special Master as follows:

> "Oregon's statutory law of conveyancing just quoted may fairly justify a ruling that Oregon adheres to the common law respecting conveying and has no rule departing therefrom."

A formal statement of said last quoted finding and conclusion appears on pages 34 and 35 of the Report of the Special Master.

The Master should have found and held that the provisions of Oregon's statutory law of conveyancing quoted, (Section 63-102 Oregon Code 1930) applied the common law only to non-navigable *streams*, and should have applied the maxim: *Expressio unius est exclusio alterius;* and following such maxim should have held that Section 63-102 did not apply to lakes.

80

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "If it be suggested that the decision of this question of local law might be postponed to await an authoritative pronouncement by the Supreme Court of Oregon (Lee v. Bickell, ____U. S. __,

> 54 S. Ct. 727, 731, c. 2 foot), it is to be said in reply (1) that where there is no pronouncement in the state courts, this court will make its own pronouncement upon the local law, and (2) that in the nature of things the questions here involved must be presently decided and cannot be left at large for or made conditional upon future action of the Supreme Court of Oregon."

A formal statement of said last quoted finding and conclusion appears on page 35 of the Report of the Special Master.

The Master should have found and held that it was the duty of this court under Federal law to apply the local law of Oregon, whether enunciated by statute or judicial decision, and that under local law the State of Oregon is the owner of the beds of lakes fronting granted and patented upland, where such grants and patents are without reservations or restrictions in terms; and the Master should have held that the pronouncements of the courts of Oregon repudiate the inference that the common law giving upland owners to the center of non-navigable lakes is in force in Oregon.

**If the Common Law, as Declared in Hardin vs. Jordan is in Force in Oregon, is that Rule Applicable to Lakes of the Character and Size of Malheur and Harney Lakes, or Should They be Held Exceptions and the Rule Declared Inapplicable Thereto.**

(Report of the Special Master, p. 36)

81

The State of Oregon excepts to the failure of the Special Master to find that the rule of Hardin vs. Jordan with reference to the ownership of upland owners to the center of the lake is inapplicable to lakes of the character and size of Malheur, Mud, and Harney Lakes.

A formal statement of the conclusion of the Special Master is found on pages 36 and 37 of the Report of the Special Master.

82

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that Malheur Lake does not give rise to an exception to the rule in Hardin vs. Jordan.

A formal statement of said last quoted finding and conclusion appears in subdivision 2 on page 67 of the Report of the Special Master.

The Master should have held and found that the common law as understood by this court is not the common law of Oregon, and that the size of Malheur lake makes the rule of the common law inapplicable, unjust and not in conformity with public interests with reference thereto; that the upland proprietors shown on plaintiff's Exhibit 22, including the success-

ors of Oregon to school and indemnity lands, the claimants to tracts numbered 1 to 73, inclusive, shown on pages 75, 76 and 77 of the Report of the Special Master Volume 2, to-wit, Appendix 14 thereof, are proper and indispensable parties hereto and should be brought in so that the title to the areas involved may be promptly and completely settled in this suit.

**If the Rule in Oregon Limits the Grantee to the Water's Edge, Does the Title From the Water's Edge to the Center of the Lake Pass to the State of Oregon or Remain in the United States if and When the Latter Patents or Otherwise Conveys the Upland.**

(Report of the Special Master, p. 37)

83

The State of Oregon excepts and objects to the finding and conclusion of the Special Master expressed by him in his report as follows:

> "(3) If the rule in Oregon limits the grantee to the water's edge, does the title from the water's edge to the center of the lake pass to the State of Oregon or remain in the United States if and when the latter patents or otherwise conveys the upland.
>
> This important question has never been decided by this court, although it has been stated otherwise in argument and decision."

A formal statement of the last quoted finding and conclusion of the Special Master appears on page 37 of the Report of the Special Master.

*

The Master should have found and held that this court has laid down a rule of law, under which either the state or the upland owner owns to the center of the lake, in accordance with state law, and that the United States has parted with title in either or any event.

84

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the case of Hardin vs. Jordan was misunderstood, by interpreting it as a case involving rules of property and not merely rules for the interpretation of grants.

A formal statement of the finding and conclusion of the Special Master appears on page 39 of the Report of the Special Master.

85

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the cases of Hardin v. Jordan, Mitchell vs. Smale and Kean v. Calumet Canal Co. did not involve a rule of property.

A formal statement of the finding and conclusion of the Special Master appears on page 38 of the Report of the Special Master.

86

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the case of Hardin vs. Shedd, 190 U. S. 508, did not decide that in the circumstances title passed from the United States to the State.

A formal statement of the finding and conclusion of the Special Master appears on page 41 of the Report of the Special Master.

87

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that in Hardin vs. Shedd, 190 U. S. 508, the question of whether title passed to the state or remained in the United States was not only not decided but the question was not involved.

A formal statement of the finding and conclusion of the Special Master appears on page 41 of the Report of the Special Master.

88

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "It is clear from the foregoing that this Court has never decided that (a) if the local law limits the patentee to the water's edge, (b) the title from the water's edge to the center of the lake passes from the United States to the state wherein the lands lie (either through or as a result of or at the time of the patent)."

A formal statement of the finding and conclusion of the Special Master appears on page 48 of the Report of the Special Master.

89

The State of Oregon excepts and objects to the report and finding of the Special Master that the statements of law in the case of Wilton vs. Van Hessen, 249 Ill. 182, 94 N.E. 134, 136 are fallacious.

A formal statement of said report and finding is found on page 49 of the Report of the Special Master.

*

The Master should have found that the Illinois Supreme court was correct in its conclusion.

90

The State of Oregon excepts and objects to the finding of the Special Master that "And no portion of any of the five Divisions has been disposed of by the United States since February 14, 1859, in terms, nor at all, unless as a legal result of the patenting or other disposition of the uplands by the United States."

A formal statement of said finding above excepted to appears in subdivision (1) on pages 16 and 17 of the Report of the Special Master.

*

The Master should have found and held that upon the granting and/or patenting of the uplands as shown in his report, title in any event passed out of the United States, in accordance with local law.

(See Report of the Special Master: Volume 2, pp. 38-52, Appendix 9; pp. 53-56, Appendix 10; pp. 98-101, Appendix 19; Defendant's Exhibit X-5, Abs. p. 111-132.)

91

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"5. The United States has never disposed of any part of the area involved (in terms); nor

at all, except such disposition as may have resulted (as matter of law) from patents, grants and listing of lands bordering on the Meander Line Boundary."

A formal statement of said last quoted finding and conclusion appears in subdivision 5 on page 66 of the Report of the Special Master.

* *

The Master should have held and found that upon a disposal of the uplands by grants and patents without reservations or restrictions, the United States thereby disposed of the beds of the lakes in front of the same.

92

The State of Oregon excepts and objects to the recommendation of the Special Master appearing in subdivision numbered 4 on page 133 of the Report of the Special Master, that a decree be entered herein decreeing:

"4. The United States of America has never disposed of any part of the area involved in terms, nor at all, except such disposition as may have resulted (as matter of law) from patents, grants and listings of lands bordering on the Meander Line Boundary and not within the area involved."

*

The Master should have recommended in place of that portion of the proposed decree numbered subdivision No. 4, set forth on page 133 thereof, a provision reading as follows:

"4. Upon the granting and patenting by the United States of the uplands, title to the beds of

the lakes fronting the same passed out of the United States, and the ownership thereof is now determined by the laws of the State of Oregon."

That such provision of said decree is an alternative decree and should be entered in the event this court holds that the lakes were not navigable waters of the United States at the date Oregon was admitted into the Union.

93

The State of Oregon excepts and objects to the finding and conclusion of the Special Master set forth in proposed finding XXIII submitted to this Court by the Special Master for approval, and set forth on page 121 of the Report of the Special Master, and which finding and conclusion is as follows:

"It is not true that by reason of the issuance of patents and|or grants of lands bordering on the Meander Line Boundary without any reservation of title to land or water within the Meander Line Boundary or by reason of any other fact or circumstance whatever, the United States as matter of intention or fact abandoned claim to any land or water within the Meander Line Boundary, but such abandonment, if it ever occurred, arose out of rules of law, if such rules of law existed, and not otherwise."

*

The Master should have found and held that where the United States grants or patents uplands upon a correctly established meander line, without reservations or restrictions in terms in the grants or patents, that it abandons the beds of the waters in front of such granted and|or patented land, and a conclusive presumption arises that it intended to and did pass

title in accordance with the law of the state, to such beds fronting such grants and patents.

94

The State of Oregon excepts and objects to that part of proposed finding XXIII submitted to this Court for approval by the Special Master and set forth on page 122 of the Report of the Special Master, which proposed finding and conclusion is as follows:

> "The United States never assented as a matter of intention or fact, in form or manner alleged in the Amended Answer, or at all, that the effect of the patents, grants and/or listings of the United States bordering on the Meander Line Boundary should be construed or given effect according to the laws of Oregon or be determined thereby and if any such assent existed it arose by operation of law pursuant to legal rules, if such existed, and not otherwise."

*

The Master should have found and held and submitted a proposed finding instead of Finding XXIII as follows:

> "The United States assented as a matter of intention and fact that the effect of the patents, grants and/or listings of the United States bordering on the meander line boundary with reference to the beds within the Meander Line Boundary should be construed and given effect according to the laws of Oregon and to be determined thereby."

95

The State of Oregon excepts and objects to that part of proposed finding XXIII submitted to this Court for approval by the Special Master, set forth on

pages 122 and 123 of the Report of the Special Master, which proposed finding and conclusion is as follows:

> "The United States never asserted, nor intended to assert, to the State of Oregon, nor to the patentees of the said United States, nor to their successors or assigns, nor any of them who accepted said patents relying thereon, nor to the world, that any conveyance, grant or patent of the United States should be construed or given effect according to the laws of the State of Oregon and or be determined by its laws, and that if any such assent or intention or assertion is deemed to have been made by the United States, it was so made solely by force and effect of law pursuant to legal rule, if any such rule existed, and not otherwise."

*

The Master should have found and should have submitted for approval to the court instead of his Finding XXIII, set forth on pages 122 and 123 of the Master's Report, a proposed finding and conclusion as follows:

> "The United States asserted and intended to assert to the State of Oregon and to the patentees of the United States and their successors and assigns who accepted said patents relying thereon, and to the world, that any conveyance, grant or patent of the United States should be construed or given effect with reference to the titles to the beds of the lakes fronting the same within the meander line boundary according to the laws of the State of Oregon and to be determined by such laws."



The State of Oregon excepts and objects to the

finding and conclusion of the Special Master as follows:

> "It is, therefore, concluded that either by the common law of Oregon a grant of upland gives the patentee to the center of the lake or title to the bed of the lake from the water's edge to the center remains in the United States."

A formal statement of said last quoted finding and conclusion appears on page 52 of the Report of the Special Master.

*

The Master should have held that neither the patentee nor the United States has title to lake bed land fronting upon granted uplands, but that the title thereto is in the State of Oregon.

97

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "4. Oregon has no claim whatever in the Malheur Lake Division and the United States is entitled to a decree to the foregoing effect and quieting its title and the title of its grantees against the State of Oregon to all interest in the Malheur Lake Division."

A formal statement of said last quoted finding and conclusion appears in subdivision 4 on pages 67 and 68 of the Report of the Special Master.

*

The Master should have held and found that the United States has no claim whatever in the Malheur Lake Division if the lake is navigable, and if this court holds it to be non-navigable, that it has a claim

only to such portion of the bed as fronts unpatented upland, and the State of Oregon owns the balance and that the respective parties are entitled to a decree quieting title in them against the other to their said respective portions.

98

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 5 on page 133 of the Report of the Special Master, that a decree be entered herein decreeing:

> "5. The State of Oregon has no right, title or interest in or to any part of the area within the Meander Line Boundary save such as is incidental to her ownership of patented lands on the Meander Line Boundary of subdivision B of the Narrows Division (between the Bridge and Mud Lake Division), and upon the Meander Line Boundary of the Mud Lake Division and in the ratio that the frontages of her riparian and or littoral lands thereon bear to the whole frontage of each, i. e., of subdivision B of the Narrows Division and of the Mud Lake Division severally, allowing for equitable considerations which may affect this ratio."

The Master should have recommended a decree in lieu of that set forth in subdivision numbered 5, on page 133 of his Report that the area involved were navigable waters of the United States and passed to the State of Oregon when it was admitted into the Union on February 14, 1859.

That in the event the court holds that such waters

were non-navigable waters, then the decree of the court should be as follows:

"5. Title passed out of the United States of America to all that portion of the beds of the lakes involved, fronting the uplands which were granted or patented, without reservations or restrictions, as is the case of all of the grants and patents in the case at bar, and by virtue of local law the State of Oregon is the owner of all of such lands so fronting such granted and patented uplands. The United States of America is the owner of all that portion of the beds of the lakes involved, fronting uplands, the title to which is undisposed of and is still in the United States of America."

99

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 13 on page 136 of the Report of the Special Master that a decree be entered herein decreeing:

"The State of Oregon has no right, title or interest whatever in or to any part of the area within the Meander Line Boundary except as determined in paragraphs 8 and 11 of this decree."

The Master should have recommended a decree in lieu of that appearing in subdivision numbered 13 on page 136 of his Report, as follows:

"13. The State of Oregon is the owner of the entire area within the Meander Line Boundary."

In the event this court should hold that said areas constitute non-navigable waters, then in lieu of the

foregoing the Master should have recommended that this court enter a decree as follows:

> "The State of Oregon is the owner of all of that part of the area within the Meander Line Boundary fronting uplands granted and patented by the United States, without reservations or restrictions."

100

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 15 on page 137 of the Report of the Special Master, that a decree be entered herein decreeing:

> "15. The State of Oregon is forever enjoined from asserting any estate, right, title or interest in or to any of the area within the Meander Line Boundary except the estates, rights, titles and interests determined in paragraphs 8 and 11 of this decree to be owned by said State."

The Master should have recommended a decree in lieu of that set forth in subdivision numbered 15 on page 137 of his Report, as follows:

> "15. The United States of America is forever enjoined from asserting any estate, right, title, or interest in or to any of the area within the Meander Line Boundary."

In the event this court shall hold such lakes and waters to be non-navigable, then as an alternative decree in lieu of the foregoing recommended form of decree, the court should enter a decree as follows:

> "15. The State of Oregon is forever enjoined from asserting any estate, right, title or interest in or to any of the area within the Meander Line

Boundary fronting uplands, the title of which have not been patented or disposed of by the United States but which uplands are still owned by the United States; and the United States is forever enjoined from asserting any estate, right, title or interest in or to any of the area within the Meander Line Boundary fronting uplands which have been granted and/or patented by the United States of America."

101

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"3. In any event the United States is the owner of 20.20% (or some equitable approach thereto) of the bed of Lake Malheur held in common with owners of upland."

A formal statement of said last quoted finding and conclusion appears in subdivision 3 on page 67 of the Report of the Special Master.

The Master should have held and found that if the lakes are navigable the United States is not the owner of any portion of the bed of Malheur Lake and that if this court finds such lake to be non-navigable, that the United States is the owner of 20.20% of the bed of Malheur Lake (or some equitable approach thereto, based upon the proper principles of apportionment), fronting the unpatented uplands, title to which is still in the United States and the balance of such bed, approximately 79.80% is owned by the State of Oregon.

102

The State of Oregon excepts and objects to the

recommendation of the Special Master, appearing in subdivision numbered 17 on page 137 of the Report of the Special Master, that a decree be entered herein decreeing:

> "17. The apportionment of the beds of the meandered areas amongst upland proprietors and the rights of persons not parties to this suit are not determined here."

*

The Master should have recommended, in the event that this court holds that the waters and lakes are non-navigable, in lieu of subdivision numbered 17, appearing on page 137 of the Report, a decree as follows:

> "17. The apportionment of the beds of the meandered areas between the United States of America and the State of Oregon shall be according to approved methods of apportionment, following the rule set forth in the case of Hardin v. Jordan, the method to be followed to be the same as if the beds involved were owned by the United States and private proprietors."

103

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 14 on page 136 of the Report of the Special Master, that a decree be entered herein decreeing:

> "14. The United States of America is the owner in fee simple absolute, in, and entitled to the possession of all the area here involved, i. e., that within the Meander Line Boundary except such aliquot parts thereof as may have been, as matter of law, transferred by the United States

of America by patents of lands bordering on the Meander Line Boundary, but as neither said patentees, nor their successors in interest (except in so far as the State of Oregon is a successor in interest of some of the patentees), are parties to this suit, no determination is herein made in respect of the rights, titles and interests acquired by said patentees in the areas within the Meander Line Boundary."

The Master should have recommended a decree in lieu of that appearing in subdivision numbered 14 on page 136 of his Report, the following:

"14. The State of Oregon is the owner of the entire bed within the Meander Line Boundary of the area involved."

In the event this court shall hold that said lakes and bodies of water constitute non-navigable lakes and bodies of water, then in lieu of the foregoing, the court enter a decree as follows:

"14. The United States of America is the owner in fee simple absolute, in, and entitled to the possession of all of that area involved herein fronting uplands, the title of which still remains in the United States and which has not been disposed of by it, and the balance thereof is owned by the State of Oregon. The method of apportionment between the lands of the United States and the State of Oregon is to be determined according to proper methods of apportionment analogous to that applied by this court under Hardin v. Jordan, which method of apportionment should be applied between the United States and the State of Oregon, even though the common law as declared in Hardin v. Jordan is not the law of the State of Oregon."

104

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 18 on page 137 of the Report of the Special Master, that a decree be entered herein decreeing:

> "This Decree shall neither bind nor inure to the benefit of third persons not parties to this suit except the patentees of the United States of America as such, and their successors in interest, who shall have the benefit of this Decree as against the claims of the State of Oregon in conflict with the titles of the United States of America herein determined to have existed prior to disposal of the uplands."

*

The Master should have eliminated from the proposed decree subdivision numbered 18 on page 137, and the whole thereof, for the reason that such third parties are not parties to this suit and not privy herein; and that it is beyond the power of this court to enter a decree affecting the rights of the State of Oregon against the upland owners with reference to the title to the beds within the Meander Line Boundary, and that the uplands granted and|or patented had all been granted and|or patented without reservations or restrictions, by the United States of America to private proprietors and|or the State of Oregon, prior to the commencement of this suit; that the title to the beds of the lakes fronting granted and|or patented uplands upon a correctly established meander line is a question of local law, and this Court cannot bind the State of Oregon by attempting to decree that title to the beds fronting such granted and patented uplands

passed or inured to such upland owners, or their successors in interest or assigns, for the reason that that is a question of local law and such a decree would be and is contrary to local law.

105

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 12 on page 136 of said Report, that a decree be entered herein decreeing:

> "(The United States of America disposed of 100% of the uplands on the Mud Lake Division, including indemnity lands. The question whether those indemnity lands participate in partition of the bed under the rule of Hardin v. Jordan or not is left open by paragraph 12 as it deals only with the rights of the State of Oregon in that division.)"

*

The Master should have recommended and set forth in the proposed decree in lieu of that set forth in brackets in subdivision numbered 12 on page 136 of the Report, the following:

> ("The United States of America disposed of 100 per cent of the uplands on the Mud Lake Division, including indemnity lands. It was and is within the province of the State of Oregon, and within its power, to declare the waters thereof navigable, and to assert its ownership and sovereignty over the bed thereof.")

106

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 11 on page 136 of the Report

of the Special Master, that a decree be entered herein decreeing:

> "11. The State of Oregon is the owner of a rateable portion of the bed of Mud Lake Division to the extent of 8.99% of said bed (as 72.31 chains bears to 806.94 chains) allowing for equitable considerations which may effect this ratio."

*

The Master should have recommended a decree in lieu of subdivision numbered 11 on page 136 of his Report, as follows:

> "11. The State of Oregon is the owner of all of the bed of Mud Lake Division."

107

The State of Oregon excepts to the finding and conclusion of the Special Master as follows:

> "Oregon is entitled to a rateable portion of the bed of Mud Lake as 72.31 chains bears to 806.94 chains allowing for equitable considerations which may affect this ratio."

A formal statement of said last quoted finding and and conclusion appears on page 70 of the Report of the Special Master.

*

The Master should have held and found that the State of Oregon was the owner of the entire bed of Mud Lake within the Meander Line Boundary.

108

The State of Oregon excepts and objects to that part of proposed finding XVII submitted to this Court for approval by the Special Master and set forth on

page 126 of the Report of the Special Master reading as follows:

> "All of the facts stated on pages 68-72 of the Report, supra, respecting the five Divisions are true."

*

The Master should have held and found the facts as suggested by the State of Oregon herein under the exceptions as set forth in Exceptions numbered 50, 52, 53, 54, 55, 56, 57, 58, 97, 107 supra and 119, 132, infra.

109

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 12 on page 136 of the Report of the Special Master, that a decree be entered herein decreeing "The United States of America is forever enjoined from asserting any estate, right, title or interest against the estates, rights, titles and interests owned and held by the State of Oregon in the Mud Lake Division, as determined in paragraph 11 of this decree," while limiting the decree enjoining the United States only to that part of the land in Mud Lake Division described in paragraph 11 of the proposed decree.

110

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "The State of Oregon has no estate, title or interest in or to any of the lands within the Meander Line Boundary or the Executive Order Boundary except such as are herein and in the

conclusions of law and the recommended form of decree expressly determined to be owned by her."

A formal statement of said last quoted finding and conclusion appears in proposed finding XVII submitted to this Court for approval and set forth on page 111 of the Report of the Special Master.

*

The Master should have found and held that the lands within the Meander Line Boundary underlay navigable waters and that the United States has no interest in the State's title or interest in or to any of such lands. The Master should have held that if this court finds that such lakes were non-navigable, then the United States was the owner only of such lands fronting and abutting unpatented and undisposed of uplands, and that the State of Oregon is the owner of the balance of the area involved.

111

The State of Oregon excepts and objects to the failure of the Special Master to add to subdivision (d) of proposed finding XV on page 105 of the Report of the Special Master the following:

"And that when Chapter 280, General Laws of Oregon, 1921, went into effect on May 24, 1921, upland owners acquired no right to future reliction, if any."

112

The State of Oregon excepts and objects to Finding numbered XXIX found on page 128 of the Report of the Special Master as follows:

"It is not true that the United States, or any of its departments, officers or agents, should be or

are estopped, by reason of any of the facts herein, from making the claims which are herein made by the United States. (Amended Answer, p. 30, foot, p. 51, middle.)

*

The Master should have made a finding that the United States, its departments, officers and agents were estopped from making any claim to the beds of the divisions involved herein fronting the uplands which have been granted or patented without reservations or restrictions as is the case with all the grants and patents, listed in Appendix 9, pages 39-71 of the Report of the Special Master: Volume 2.

**If the Rule in Oregon be That the Grantee Takes to the Center of the Lake, Does that Rule Apply to a School Section to which Oregon Became Entitled Under the Act of Admission, Effective, However, Only Upon Approved Survey (240 U. S. 210, Lines 1-7), if it be Disclosed That the Section Borders Upon a Meander Line; and is the Rule Applicable to School Sections Equally Applicable to Indemnity Lands Taken in Lieu of Deficiencies in School Sections.**

(Report of the Special Master, p. 52)

113

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"Lands granted under the Act of Admission effective at the moment Oregon came into the Union (although the lands were to be identified

and the grant effective in futur. do not come within the ideas underlying the rule of Hardin v. Jordan, comprehensively stated in Oklahoma v. Texas, supra, pp. 38-39."

A formal statement of said last quoted finding and conclusion appears on page 52 subdivision (4) of the Report of the Special Master.

*

The Master should have held that the rule that "grants of the government for lands bounded on streams and other waters, without reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie," (Hardin vs. Jordan, 140 U. S. 372, 384) applies with equal force to lands granted under the Act of Admission, including school lands and indemnity lands.

114

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"It will be seen under the next point that Oregon acted upon that assumption because she used deficiencies in fractional school sections bordering on the Meander Line Boundary as base for lieu lands selected by her elsewhere."

A formal statement of said finding and conclusion appears on pages 52-53 of the Report of the Special Master.

*

The Master should have found and held that acts of the administrative officers of Oregon in using

deficiencies in fractional school sections bordering on the Meander Line Boundary as base for lieu lands, do not constitute an estoppel against the State of Oregon, and that in any event only so much of such bed as was included within the deficient fractional subdivision used as a base would revest in the United States, and that in fact such acts of officers of Oregon constitute administrative constructions and interpretations that the waters of the lakes were navigable waters.

115

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "I therefore reach the conclusion that lands under the beds of lakes are not to be added to school and indemnity lands bordering on meander lines."

A formal statement of said finding and conclusion appears on page 52 of the Report of the Special Master.

*

The Master should have found and held as suggested in Exception 113, supra, and that unless the local law is otherwise the rule of riparian rights including apportionment of relicted lands is applicable to school and indemnity lands the same as to other grants and patents of the United States.

116

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"The idea of enjoying the deficiency within the meandered area and the right to go from the meandered line to the center of the lake are inconsistent. This is true quite regardless of whether the rule stated in earlier cases that the upland proprietor is merely entitled to complete his subdivision, has been followed in later cases or not."

A formal statement of said last quoted finding and conclusion appears on page 53 of the Report of the Special Master.

* * *

The Master should have found and held that only so much of the fractional subdivision as was used as base, if any, would be relinquished to the United States, and inasmuch as the use of the deficiencies as base was subsequent to the passing of title out of the United States, only so much as was used as base, if any at all, was lost to the State of Oregon; and the same rule should be applied in this respect as applies to all navigable waters.

117

The state of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"2. Taking as premises (a) that Malheur Lake does not give rise to an exception to the rule in Hardin v. Jordan, and (b) that the common law as understood by this Court is the common law of Oregon, it is not necessary and it would be inappropriate in the absence of the only persons interested therein (the successors in interest of the State of Oregon of school and indemnity land) adversely to the United States to determine whether in a rateable partition of the bed

of the lake among upland proprietors the above percentage of 1.34% and 4.80% should be taken by the owners of the upland school and indemnity lands or by the United States."

A formal statement of said last quoted finding and conclusion appears in subdivision 2 on page 67 of the Report of the Special Master.

118

The State of Oregon excepts and objects to the finding and report of the Special Master as follows:

"It is unnecessary and inappropriate to decide in the absence of the owners of indemnity lands bordering on Mud Lake, whether they are or may be entitled to participation in the partition of the bed of Mud Lake to the extent of such a proportion as 261.47 would bear to 806.94 or whether than percentage of the lake should be allotted to the United States. The Decree here would not bind them nor inure to their benefit."

A formal statement of said finding and report is found on page 70 of the Report of the Special Master.

*

The Master should have found and held that the United States had no right, title or interest in or to any portion of the bed of Mud Lake; should have further found that the title to the bed is to be determined by the local law, the law of the State of Oregon and that under that law the State of Oregon is the owner of the whole of the bed of said lake.

*

The Master should have further found that the owners of the upland fronting on the Meander Line of

Mud lake were proper and necessary parties and should have been made parties herein, and should now be brought in before final decree is entered herein.

**If Fractional Sections of School Lands Border Upon a Meandered Lake and the State Uses the Deficiency Within the Meandered Lake as Base for Lieu Lands is the State Also Entitled to the Benefit of the Rule of Hardin vs. Jordan.**

(Report of the Special Master, p. 54)

**Harney Lake Division**

(Report of the Special Master, pp. 71-72)

119

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "The remaining 172.63 acres of school land passed to Oregon under a survey approved before the Executive Order but there are two reasons why this tract of 172.63 acres is not entitled to a rateable participation in the bed of Harney Lake. They are these: (a) that school lands do not take the benefit of the rule in Hardin v. Jordan, and (b) that in any event as shown by Appendix 18 (Report of Special Master: Vol. 2, p. 96) Oregon took deficiency within the meander line in respect of a Section 36 whereof the above 172.63 acres was a part, for use as lieu

land elsewhere and cannot claim the benefit of the rule of Hardin v. Jordan."

A formal statement of said last quoted finding and conclusion appears on pages 71 and 72 of the Report of the Special Master.

*

The Master should have found and held that the State of Oregon is the owner of the entire bed of Harney Lake, such waters being navigable waters; that in the event this court holds the waters of such lake to be non-navigable, that the United States would be the owner only of the lands fronting the unpatented and ungranted uplands, the remainder thereof to be decreed to be owned by the State of Oregon, except such portions as were by operation of law and not otherwise relinquished when used as base, in the event this court holds the lakes involved to be non-navigable.

120

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"Oregon thereby gave a construction to the Act of Admission and of her rights thereunder (the right to use base in the meandered area for lieu lands to be elsewhere selected) and can not now claim that the fraction of the same section bordering on the meander line gave rise to rights under Hardin v. Jordan. Indeed, cases are supposable where in practical effect the claim of deficiency within a meandered line would afford greater area than that obtainable under Hardin v. Jordan and in instances reach the opposite shore."

A formal statement of said last quoted finding and conclusion appears on page 55 of the Report of the Special Master.

*

The Master should have found and held that the fact that the administrative officers of Oregon in certain instances used as base for selecting indemnity lands elsewhere the fractional deficiencies in sections caused by the meandering of the lake can not estop the State of Oregon from asserting its local law as to lands not included in such fractional deficiencies. That the use of such lands as base either on navigable or non-navigable waters does not estop the state from asserting title to lands not included within the boundaries of such tracts so used.

121

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "From the foregoing it follows that the United States is the owner of all the interests in Harney Lake Division except the interest of the above patentee, John C. Clement, or his successors which it would not be appropriate to determine in his absence."

A formal statement of said last quoted finding and conclusion appears on page 72 of the Report of the Special Master.

**Are the Statutes Pleaded in Haec Verba in the Amended Answer and Counterclaim (Also set out in Supplement to Master's Report, pp. vi to xiv) Effective to Give Oregon Title to the Lands Within the Meander Line Boundary, or to any Thereof.**

(Report of the Special Master, p. 55)

122

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the legislation of Oregon as construed by her in this case would seem to be a clear violation of the provision of the Act of Admission of Oregon on June 3, 1859, wherein it was ordained that the State of Oregon "would never interfere with the primary disposal of the soil within the same by the United States," and the further finding and conclusion of the Special Master as follows:

> "(And the antecedent rights of the United States of which the provision was merely "declaratory") i. e., because it is an undue interference with the power of the United States to dispose of her own lands (a) through the appropriation by Oregon of the title of the United States to beds of non-navigable lakes, thereby rendering impossible disposal thereof by the United States, and (b) (in the alternative) by providing that if the United States disposes of a material part of the uplands along a meandered line it is within the power of the State by fiat to declare herself to be the owner of the meandered area. This authority is not predicated upon an intention to be imputed to the United States. Oregon thus claims in effect that it may 'take from the United States their own land, against their own will, and against their own laws' (Wilcox v. McConnel, 13 Pet. 496, 515-516; Gibson

> v. Chouteau, 13 Wall. 92, 99), thereby 'placing the public domain of the United States completely at the mercy of state legislation.' (Camfield v. United States, 167 U. S. 518, 524-526.) No state can acquire property of the United States by legislative fiat. (Van Brocklin v. Tennessee, 117 U. S. 151, 164-165.) The authority of a state over property of the United States must be found in the Constitution of the United States or in consent of Congress."

A formal statement of said finding and conclusion appears on pages 59 and 60 of the Report of the Special Master.

*

The Master should have held that the State of Oregon is not attempting to interfere with any disposal of soil owned by the United States, nor is it claiming to own any of the beds of any non-navigable lake in front of unpatented uplands the title to which is still in the United States, nor is it attempting to take from the United States any of its land, against its will, or against its own laws or otherwise, nor is it attempting to claim any interest in public domain of the United States, nor is it attempting to acquire property of the United States by legislative fiat or otherwise.

123

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "This legislation is supposed to be based upon observations in some decisions of this and other courts, but these do not seem to justify any such legislation. Moreover, the remarks upon which

> Oregon sets reliance had to do with a declaration *that a particular body of water was* navigable and/or public. Here, there is a legislative declaration of navigability in respect of *many* bodies of water which are not only confessedly non-navigable but the non-navigability of some of which abstractly this Court might feel free to take notice."

A formal statement of said finding and conclusion is set forth on page 59 of the Report of the Special Master.

*

The Master should have found that it was within the power and province of the State of Oregon to declare all waters of lakes fronting granted and patented uplands to be navigable and public waters, where such grants and patents are without reservations or restrictions, and to assert ownership of and sovereignty over the beds underneath such waters and to preserve their control for the benefit of the public.

The Master should have found that the Oregon lake legislation is supported by the decisions of this and other courts; that such legislation refers to all its lakes which have been meandered, and is applicable thereto, and is determinative of the title to all that portion of the lake bed which does not front undisposed of public lands on such meander lines.

124

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "Non-navigable lakes present an entirely different question. The beds of these lakes re-

> mained the property of the United States. By her legislation Oregon would take over from the United States the ownership of the beds even if no disposal of the uplands had ever been made by the United States.".

A formal statement of said finding and conclusion appears on page 58 of the Report of the Special Master.

*

The Master should have found that the United States parts with title to so much of the beds of non-navigable lakes as front uplands granted or patented without reservations or restrictions; and that Oregon's legislation would merely be inoperative as to the beds of the non-navigable lakes fronting uplands owned by the United States and which are still undisposed of by the government.

125

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "If, therefore, the United States is free to dispose of the upland without disposing of the bed and conversely of the bed without the upland, it is not within the power of a state to ordain that if it sells one without the other, the one not disposed of passes (or is forfeited) to the state."

A formal statement of said finding and conclusion appears on page 61 of the Report of the Special Master.

*

The Master should have held that no question is

involved in this case of the United States disposing of the upland without disposing of the bed; but the Master should have found that when the United States disposes of upland without reservations or restrictions on any meandered non-navigable lakes, it disposes of the bed of the lake and the effect of the grant as to whether the title passes to the State or the upland proprietor is determined by the laws of the State.

126

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "Oregon seeks by the above legislation to appropriate (without compensation) the beds of all non-navigable meandered lakes through the medium of declaring them to be 'navigable and public waters'."

A formal statement of said finding and conclusion appears on page 59 of the Report of the Special Master.

127

The State of Oregon excepts and objects to the conclusion of the Special Master that one of the questions of importance to be decided in this case is "whether by a statutory law Oregon has succeeded to the title of the United States to the beds of the lake *ex proprio vigore*."

A formal statement of said finding and conclusion appears on page 63 of the Report of the Special Master.

128

The State of Oregon excepts and objects to the report and finding of the Special Master as follows:

> "The legislation is not conditioned upon the disposal of a Material part of the upland by the United States but applies to all meandered lakes within the state *ex proprio vigore* whether owned by the United States or its successors.

A formal statement of said report and finding is found on page 58 of the Report of the Special Master.

*

The Master should have found that Oregon's legislation would simply be inapplicable to lands owned by the United States, but would be applicable to patentees and grantees of the United States of upland and their uccessors in interest and title.

**Was the Executive Order of August 18, 1908, Valid as and From That Date.**

(Report of the Special Master, p. 61)

129

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the executive order of August 18, 1908, was valid at the date of its promulgation.

A formal statement of said finding and conclusion appears on page 62 of the Report of the Special Master.

*

The Master should have found that the Executive Order of August 18, 1908, was invalid and in any event was inoperative as to any lands not then owned by the United States.

130

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "It is not true that the Executive Order of August 18, 1908, was of no force or effect, or that it was ultra vires, or that it constituted an unlawful or any attempt to exercise jurisdiction or control over lands or waters owned by or under the control of the State of Oregon. (United States v. Midwest Oil Co., 236 U. S. 459, 466, 470 (1915).)"

A formal statement of said last quoted finding and conclusion appears on page 81 of the Report of the Special Master, a part of paragraph VI of the proposed finding submitted for the approval of this Court.

*

The Master should have found and held that the Executive Order of August 18, 1908, was of no force and effect, and in any event could not apply to any lands not then owned by the United States.

**The Sand Reef Division**

(Report of the Special Master, pp. 70-71, 110)

131

The State of Oregon excepts and objects to the

finding and report of the Special Master that title to Lots 1, 2 and 3 of Section 36, Township 26 South, Range 30 East, north of Malheur Lake did not pass to the State of Oregon under the Act of February 14, 1859, admitting Oregon into the union upon the ground that the Executive Order of August 18, 1908, was valid, the State asserting that said Executive Order was invalid.

A formal statement of said last quoted finding and conclusion appears in subdivision (b) of proposed finding XVI submitted to this Court for approval shown on page 110 of the Report of the Special Master.

132

The State of Oregon excepts to the finding and conclusion of the Special Master as follows:

> "As it is held that the Executive Order was valid as of its date, the United States owns all of the Sand Reef Division within the Meander Line Boundary except such as may belong to the two patentees aforesaid as their successors whose rights will not be adjudged herein in their absence."

A formal statement of said last quoted finding and conclusion appears on page 71 of the Report of the Special Master.

The Master should have held the Executive Order invalid, and the waters of the Sand Reef Division navigable waters and the bed thereof owned by the State of Oregon, and should have found that if this court holds such waters non-navigable, that the United

States is the owner only of such portion thereof as fronts unpatented lands, and that the common law as declared in Hardin vs. Jordan, applies to the United States but not to the State of Oregon or private persons as to the balance of the bed.

133

**The Harney Lake Division.**

(Report of the Special Master, p. 71, 110).

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that title to Lot 4 of Section 36, Township 26 South, Range 30 East, north of Malheur Lake did not pass to the State under the Act of February 14, 1859, admitting Oregon into the union.

A formal statement of said finding and conclusion appears in subdivision (c) of proposed finding XVI submitted to this Court for approval found on page 110 of the Report of the Special Master.

**In View (1) of the Absence From the Case as Parties of (a) the Upland Proprietors and (b) the "Settlers" Within the Meander Line Boundary, and That (2) Oregon Takes Positions Inconsistent With Claims That They Might be Expected to Make, how far should the Court Proceed in the Making of a Decree Without Their Presence.**

(Report of the Special Master, p. 63)

134

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that a decree can be entered herein without bringing in the upland proprietors and settlers as proper, necessary and indispensable parties.

(See suggested Findings under Exceptions 82, 102, 103, and 104, supra.)

135

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that it would be seemingly inappropriate for this court to bring in the upland proprietors and the settlers.

A formal statement of said finding and conclusion appears on page 63 of the Report of the Special Master.

*

The Master should have found and held that this court has full jurisdiction of all questions affecting the lands and waters involved, that the upland proprietors and the settlers and claimants to portions of the beds of the lakes are necessary and indispensable parties and it is appropriate that they should have been parties herein and that this case cannot be determined without bringing them into court, and that if necessary a receiver should be appointed over the areas involved so that the title to the *res* be forever determined herein.

136

That under subdivision numbered 21 on page 137 of the proposed decree, the Master should have rec-

ommended that the upland owners on the Meander Line Boundary shown on Plaintiff's Exhibit 22 and the settlers and claimants to the beds of the lakes, listed on pages 75, 76 and 77 of the Report of the Special Master, Volume 2, and also shown on said Exhibit 22, should be brought into and made parties to this case so that a final determination may be entered herein.

137

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "It would seem appropriate to decide the above question and connected question as far as may be and to leave the controversy with (a) the upland proprietors and (b) the 'settlers' to be determined in later litigation either in the federal courts for Oregon or in the state courts."

A formal statement of said last quoted finding and conclusion appears on page 64 of the Report of the Special Master.

*

The Master should have found and held that the upland owners, the settlers and claimants to the bed were necessary and indispensable parties herein and that they should be brought in prior to the final determination of this suit by the Court.

138

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the United States "may be properly awarded a decree that it once owned all the area involved and

still is the owner thereof except as to such portions as have been granted under the Act of Admission or by patent."

A formal statement of said finding and conclusion appears on page 65 of the Report of the Special Master.

*

The Master should have held and found that the United State is not the owner of any portion of the lake beds involved in this suit if the lakes are navigable and that if this court holds said lakes or any portion of them are non-navigable, that the United States in any event is not the owner of any portion of the lake beds fronting lands granted or patented without reservations or restrictions, including school and indemnity lands.

**Is There Anything in the Case Which Requires the Application of the Rule That a Plaintiff in a Suit to Quiet Title Must Recover Upon the Strength of his own Title and not Upon the Weakness of the Title of the Defendant.**

(Report of the Special Master, p. 64)

139

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the unique requirements of the case call for an exception to the rule that a plaintiff in a suit to quiet title must recover upon the strength of his own

title and not upon the weakness of the title of the defendant.

A formal statement of said finding and conclusion appears on page 65 of the Report of the Special Master.

*

The Master should have held and found that there is nothing in this case which calls for an exception to the rule that a plaintiff in a suit to quiet title must recover upon the strength of its own title.

140

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

> "Again, it will be permitted on its own behalf, and on behalf of its grantees, to obtain a decree against Oregon as to the basic facts upon which the validity and sufficiency of its grants would depend."

A formal statement of said last quoted finding and conclusion appears on page 65 of the Report of the Special Master.

*

The Master should have found that the United States was not entitled to any decree against Oregon if the lakes involved are navigable, and it is not entitled to any decree against Oregon as to the beds of the lakes fronting granted and patented uplands if this court holds the lakes to be non-navigable, and that the decree should adjudicate that the title to the beds of the lakes fronting patented and granted uplands is to be determined in accordance with the laws of the State of Oregon.

141

The State of Oregon excepts and objects to the conclusion of the Special Master that the decree in the case of the United States vs. Utah, 283 U. S. 800, 803, adjudicated the right of the United States to enjoin defendant from asserting title to the bed of the river which had been conveyed by the United States before suit brought.

A formal statement of said finding and conclusion appears on page 65 of the Report of the Special Master.

*

The Master should have held and found that the issues involved in the case of United States vs. Utah 283 U. S. 800 under the pleadings, show that the rights of upland owners bordering on the rivers and streams involved and mineral claimants to portions of the beds, all of which had been disposed of by the United States prior to the commencement of this suit were not involved, and that the suit involved only "those lands riparian to and on both sides of, and also including all of the bed" of the streams and rivers involved, which lands were largely unsurveyed and uplands all unpatented and still owned by the United States (See Bill of Complaint United States vs. Utah, paragraphs 2 and 3, also Exhibit A, page 17), and the expression in the decree of the court "or its grantees" refers only to *subsequent* grantees of lands *then owned* at the time the suit was commenced by the United States.

142

The State of Oregon excepts and objects to the conclusion of the Special Master as follows:

"Moreover, the interest of the United States at the time of the commencement of the suit is sufficient to support an appropriate decree under the most rigid rule."

A formal statement of said last quoted finding and conclusion appears on page 65 of the Report of the Special Master.

*

The Master should have found and held that the United States has no interest in the beds of the lakes if they were or are navigable and no right, title or interest in such beds fronting granted and patented uplands if this court holds such lakes to be non-navigable.

143

The State of Oregon excepts and objects to the finding and conclusion of the Special Master as follows:

"Indeed, there are numerous cases where grantors of lands have been permitted to maintain suits to quiet title to enure to the benefit of their grantees upon one set of circumstances or another, the underlying spirit of which might very well justify the application of that rule to the circumstances of this case."

A formal statement of said last quoted finding and conclusion appears on page 66 of the Report of the Special Master.

*

The Master should have held and found that there are no facts in this case justifying or warranting any departure from the rule that a plaintiff must recover upon the strength of its own title.

144

The State of Oregon excepts and objects to the finding and conclusion of the Special Master that the decree in this case should expressly reserve the rights of third persons not parties to this suit.

A formal statement of said last quoted finding and conclusion appears in subdivision 6 on page 67 of the Report of the Special Master.

The Master should have held and found that third persons not parties to this suit, namely the claimants to and settlers bordering upon and also within the Meander Line Boundary should be brought in so that the whole controversy may be completely and finally determined herein.

**Conclusions of Law**

(Report of the Special Master, p. 132)

145

The State of Oregon excepts and objects to the proposed conclusions of law submitted to this Court for approval by the Special Master, and set forth on page 132 of the Report of the Special Master, and which proposed conclusions of law submitted to this Court are as follows, to-wit:

CONCLUSIONS OF LAW.

"And as the conclusions of law from the foregoing facts, it is declared that the plaintiff is entitled to a decree in terms as annexed."

The Master should have made a conclusion of law

in place of the conclusion of law set forth on page 132 of his Report, as follows:

> And as the conclusions of law from the foregoing facts, it is declared that the plaintiff and defendant are entitled to a decree in terms as annexed.

**Counterclaim of the State of Oregon**

(Report of the Special Master, p. 137)

146

The State of Oregon excepts and objects to the recommendation of the Special Master, appearing in subdivision numbered 19 on page 137 of the Report of the Special Master, that a decree be entered herein decreeing:

> "The counterclaim of the State of Oregon is hereby dismissed except in respect of matters determined in paragraphs 8 and 11 of this Decree."

That said subdivision numbered 19 on page 137 of the Report of the Special Master should be eliminated entirely, as the same is contrary to the foregoing recommended findings and contrary to law as hereinabove set forth, and contrary to the provisions of the proper decree which should be entered herein.

Respectfully submitted,

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L. A. LILJEQVIST,
*Assistant Attorney General.*